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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 565

KITTY HAWK DEVELOPMENT CO., a corporation,
Appellant

v.

THE CITY OF COLORADO SPRINGS, a municipal corporation, *Appellee*

On Appeal from the Supreme Court of Colorado

JURISDICTIONAL STATEMENT

ROBERT DUNLAP
Cool & Phillips
Mining Exchange Building
Colorado Springs, Colorado

E. BARRETT PRETTYMAN, JR.
Hogan & Hartson
800 Colorado Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Colorado, reversing the judgment of the District Court, El Paso County, and remanding the cause for dismissal of the complaint. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial federal question is presented.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court for El Paso County are not reported. The majority and dissenting opinions of the Supreme Court of Colorado are reported at 392 P. 2d 467 but have not yet appeared in the Colorado Reports. Copies of the Findings and Conclusions of the District Court, and of the opinions and judgment (included in the court's opinion) of the Colorado Supreme Court, are attached hereto as Appendix A.

JURISDICTION

This suit for the return of a sum of money was brought in the District Court for El Paso County, Colorado, alleging the unconstitutionality of a city ordinance under both the Federal and State Constitutions. The judgment of the Colorado Supreme Court here appealed from was originally dated and entered May 4, 1964. It became final under the Rules of the Colorado Supreme Court on June 8, 1964, when that Court denied appellant's timely Motion for Rehearing. A Notice of Appeal was filed in that Court on August 7, 1964.

The jurisdiction of the United States Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1257 (2) and is sustained by *Union Pacific R. Co.* v. *Public Service Com'n of Missouri*, 248 U.S. 67 (1918), and *Staub* v. *City of Baxley*, 355 U.S. 313 (1958).

ORDINANCE AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2E (1) of Subdivision Ordinance No. 1987 of the City of Colorado Springs, Colorado, as amended, is found at page 772 of "The Code of the City of Colorado Springs, Colorado" (Michie City Publica-

tions, Los Angeles, 1958). This Ordinance and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution are attached hereto as Appendix B.

QUESTION PRESENTED

The Subdivision Ordinance of Colorado Springs, Colorado, requires that as a condition to the subdivision and sale of his land, the owner shall convey to the City eight per cent of the land or, at the option of the municipality, eight per cent of its value in money. In case of disagreement, value is to be set by a City committee. The appellant, Kitty Hawk Development Company, owned property outside but contiguous to the city limits. The land was useless without water, and the City is the sole source of water facilities in the area. Kitty Hawk was bound by contract with a third party, presumably enforceable by a suit for specific performance, to seek water facilities from the City, but the City refused to furnish such facilities unless Kitty Hawk first applied for annexation of its property to the City and then complied with the ordinance by conveying to the City eight per cent of its land or the equivalent value. Faced with this choice, Kitty Hawk complied and paid the City $25,378.08.

The question presented is whether this ordinance, required by the City as a condition to the exercise of its governmental powers and submitted to by Kitty Hawk under business compulsion, constituted a taking of private property for public use without just compensation, a deprivation of property without due process, and a denial of equal protection of the laws, all in violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT

On August 10, 1954, the appellant, Kitty Hawk Development Company, contracted to purchase for $442,215.00 approximately 100 acres of land contiguous to but outside the corporate limits of Colorado Springs, Colorado. The contract provided that Kitty Hawk would seek water facilities from the City, since the City was the sole source of water in the area. Kitty Hawk prepared a plat of the land and submitted it to the County Commissioners of El Paso County, who approved it.

Immediately thereafter, the City informed Kitty Hawk that it would not furnish water service unless the land was first annexed to the City (fol. 244), and unless Kitty Hawk then complied with Section 2E of the City's Subdivision Ordinance. This section provides in part:

> The owner of the land in each subdivision shall allocate and convey eight per cent of the area of the land in his subdivision, exclusive of streets and alleys, for park, playgrounds, schools, recreational or similar public purposes, at such location as designated by the City or at the option of the City, said owner, shall in lieu of such conveyance of land in kind, pay to the City in cash an amount equal to eight per cent of the value of the land.

The section goes on to provide that if the City and the owner cannot agree on the value of the land, the value shall be fixed by a committee of the Colorado Springs Board of Realtors, and that the proceeds from the payments shall be used by the City for the acquisition of land for "parks, playgrounds, schools, recreational or similar public purposes."

The members of Kitty Hawk's board of directors were thus faced with a most difficult business and legal situation. They did not want annexation.[1] But the land was of no value whatever without water. Moreover, Kitty Hawk had a contract obligation to the land seller, presumably enforceable by a suit for specific performance, to use due diligence in seeking water facilities. It had already invested approximately $12,000.00 in out-of-pocket funds in this land (fol. 208, 282), and the contract price was for $442,215.00 —an indication of the business opportunity to be lost if water facilities were denied. Faced with these facts, the board of directors felt that it had no alternative but to seek annexation and to comply with the City's ordinance.

Accordingly, the necessary petition was filed with the City, and annexation was completed. Pursuant to statutory requirements of the State of Colorado, which impose criminal and other penalties for non-compliance, Kitty Hawk presented its subdivision plat to the City. The City's subdivision ordinance thereupon became applicable, and the City imposed, as a condition for approval of the plat, a charge of $25,378.08, calculated as eight per cent of the value of the land as appraised by the City. Kitty Hawk paid the charge. Fol. 193, 196, 408.

The development of the land was then carried to completion, including the installation, at Kitty Hawk's expense, of water and sewer facilities, curbing and street paving. Fol. 282. There is in the record no evidence of any uncompensated expenditure by the City

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[1] The Colorado Supreme Court conceded this fact. Appendix A, *infra*, p. 8a.

for any facilities furnished as a consequence of annexation.

On April 14, 1961, Kitty Hawk filed an action in the District Court of El Paso County, Colorado, to recover the $25,378.08.

In its complaint Kitty Hawk alleged that the ordinance violated not only the State but the Federal Constitutions. It charged in part:

> That said Article II, Section 2 E (1) of Ordinance No. 1987, as amended by ordinance No. 2179, is void in that said sections violate Article XIV of the Amendments to the Constitution of the United States in that said sections deprive plaintiff of its property without due process of law and denies to plaintiff the equal protection of the laws. [Par. XXIII, fol. 37.]

The Pre-Trial Order of the trial court provided, by stipulation of the parties, that one of the issues was:

> Is Ordinance No. 1987, as amended by Ordinance No. 2197, of the City of Colorado Springs, invalid either under the statutes of the State of Colorado or the constitutions of the State of Colorado and of the United States? [Fol. 103.]

On November 7, 1962, the trial court entered its Findings of Fact and Conclusions of Law, followed by judgment in favor of Kitty Hawk. The Findings and Conclusions made no reference to the United States Constitution, but did determine that the ordinance was void for violation of the Colorado Constitution in that it "provides for the taking of property without due process of law * * * ; usurps a judicial function in

that it prohibits the determination of the value of the land by judicial process * * * and that it places an unequal burden of tax upon the plaintiff." In addition, the trial court found that "plaintiff has not by agreement or waiver, lost its right to attack the validity or constitutionality of this ordinance * * * ". Appendix A, *infra*, p. 3a.

The City, by writ of error from the Supreme Court of Colorado, challenged the judgment of the trial court.

In its Answer Brief, Kitty Hawk again raised the Federal constitutional questions:

> I. ARTICLE II, SECTION 2E (1), OF ORDINANCE No. 1987, AS AMENDED BY ORDINANCE No. 2179, IS UNCONSTITUTIONAL AND VIOLATES ARTICLE II, SECTIONS 3, 15 AND 25, OF THE COLORADO CONSTITUTION AND AMENDMENT XIV, SECTION 1, OF THE FEDERAL CONSTITUTION. [2]

Later in its brief, in answer to the City's claim of estoppel by the "voluntary" act of petitioning for annexation, Kitty Hawk specifically posed this question:

> May a government exact, by agreement or otherwise, the surrender of a constitutional right as a consideration for the exercise of its power? [3]

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[2] Answer Brief of Defendant in Error, filed July 1963, p. 17. The constitutional points were then argued for sixteen pages in the brief (pp. 17-32).

[3] *Id.* at 73. The point was argued in the brief for twenty pages (pp. 73-92).

The Colorado Supreme Court reversed the judgment of the trial court. Purportedly, it found it unnecessary to pass upon the constitutional issues. Actually, it necessarily passed upon them when it held that the City was under no constitutional duty to furnish water or to annex property, that Kitty Hawk had no legal obligation to seek annexation, that the City could impose such conditions to the exercise of its authority as it saw fit, and that therefore the taking of eight per cent of Kitty Hawk's property was merely the result of an "agreement" between the parties. This opinion in net effect rejected the doctrine of unconstitutional conditions established by this Court and held that the taking of Kitty Hawk's property did not violate the Fourteenth Amendment.

The dissenting Justice of the Colorado Supreme Court correctly treated the so-called "agreement" as an act undertaken by Kitty Hawk under business duress and compulsion because of a condition which the City had no constitutional right to exact. The "agreement" was not an excuse for the state court to avoid the constitutional question; it was in fact the very nub of the constitutional question. The dissenting justice specifically cited the United States Constitution as well as several opinions of this Court. And he concluded:

> If the majority opinion is sound, due process of law in Colorado is dead, and the constitution is an empty shell which affords protection to no one against demands by agencies of government which fundamental law commands shall never be made. [Appendix A, *infra*, p. 38a.]

THE FEDERAL QUESTION IS SUBSTANTIAL

This case presents vital constitutional issues in one of the most rapidly changing areas of the law. This Court has never decided these issues, although it has set forth criteria and doctrines which we think are applicable. So far as we can determine, the Colorado Supreme Court has gone further than any other court —state or federal—in upholding the power of a city to impose conditions on the exercise of its authority and to take property without the payment of just compensation.

The issues here must be viewed against the background of recent developments in the field of annexation, of modern controversy over the doctrine of unconstitutional conditions, and of the specific facts that make this a particularly serious case of constitutional deprivation.

Annexation was in large-scale use prior to the turn of the Century but declined between 1900 and the end of World War II. In the final year of the war, a remarkable revival began. One report has summarized the change as follows:

> In 1961, the number of annexing municipalities containing at least 5,000 people was the largest in the last 17 years. The number was 719; this is more than one of every five municipal governments of this size in the nation.
>
> The total amount of land was the second largest in the last 14 years.[4]

Postwar annexation was of a substantially different type from what had been before, and one of its out-

[4] "The States and the Metropolitan Problem, A Report to the Governors' Conference," The Council of State Governments 25-30 (Chicago 1956).

standing characteristics was that cities used it for the taking of much smaller properties.[5]

As the type and extent of annexation changed, so did the accompanying constitutional problems. Several jurisdictions recognized these problems by specifically providing by statute that dedications of land (or its equivalent value) for public use in subdivisions must be compensated.[6] Others have held by judicial decree that a developer can constitutionally be required to assume the costs of only such improvements as are *specifically and uniquely* attributable to the addition of the subdivision to the city, such as widening streets, constructing gutters, and eliminating traffic hazards.[7]

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[5] "Municipal Yearbook," The International City Managers' Association (Chicago 1962). The same source contains the following statistical record for a fourteen-year period subsequent to World War II:

Year	Square Miles Annexed
1961	798.2
1960	1082.9
1959	623.0
1958	493.8
1957	387.3
1956	644.4
1955	348.0
1954	325.2
1953	282.3
1952	276.3
1951	147.7
1950	201.7
1949	271.0
1948	145.3

[6] See, *e.g.*, Mass. Ann. Laws, Ch. 41, § 81Q (1953); Planning Rules and Regulations for Puerto Rico, cert. 55 (1952).

[7] Note, 50 Ky. L.J. 610 (1962); Note, 50 Ill. B.J. 626, 630 (1962); Freese, "Subdivision Regulations and Compulsory Dedications," 39 Dicta 299, 302-303 (1962); Kratovil, "Some New Developments and Trends in Real Property Law," 43 Title News 2, 3 (Aug. 1964). Even this "specifically and uniquely" test has never been passed upon by this Court.

Since schools, playgrounds and parks benefit the community as a whole, many state courts have concluded that the compulsory dedication of land for such use is unconstitutional.

For example, *Pioneer Trust and Savings Bank* v. *Village of Mount Prospect,* 22 Ill. 2d 375, 176 N.E. 2d 799 (1961), was a suit involving the compulsory dedication of one acre out of every sixty residential sites, which the city wished to use for schools and playgrounds. The court held that these improvements were not "specifically and uniquely" attributable to the addition of the subdivision but rather were related to the development of the community as a whole. The dedication requirement was therefore unconstitutional. In *Rosen* v. *Village of Downers Grave,* 19 Ill. 2d 448, 167 N.E. 2d 230 (1960), the court struck down a required per-lot cash payment for school purposes, in part on the ground that the amount of money required was not directly tied to the needs of the particular subdivision. And in *Miller* v. *Beaver Falls,* 368 Pa. 189, 82 A. 2d 34 (1951), a state statute had the effect of freezing the use of land for three years, during which time the city had an option to buy the land and use it for a park. The city urged the court to uphold the statute on analogy to the requirement of street dedications, but the court refused to extend this power to include park space. Similarly, in *Kelber* v. *City of Upland,* 155 Cal. App. 2d 631, 318 P. 2d 561 (Dist. Ct. App. 1957), in addition to holding that there was no statutory authority for requiring a fee of $30.00 per lot for a school and park fund, the court made a special point of the fact that the fund was not restricted to improvement of the subdivision itself, but was used instead to meet the needs of the whole community.

The rationalization for the approach in all of these cases has been succinctly stated by this Court:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[8]

Thus, even if this case involved no more than a simple requirement that uncompensated land or money be given up for schools, parks and the like, it would present a substantial constitutional question that has not been decided by this Court.

But the issues here are much broader and much more serious. For they involve the City's refusal to exercise three of its powers—the power to annex, the power to allow subdivision, and the power to supply water facilities—unless and until Kitty Hawk relinquished its property. The City, we submit, violated three times over the doctrine of unconstitutional conditions.

Generally stated, the doctrine of unconstitutional conditions is that it is a violation of due process to require a person to surrender a constitutional right as the price of engaging in a legitimate course of conduct.

The doctrine and its rationale have nowhere been better stated than in *Frost & Frost Trucking Co.* v. *Railroad Comm'n of California,* 271 U.S. 583, 593-594 (1926):

> It is not necessary to challenge the proposition that, as a general rule, the state, having power

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[8] *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960). See also HAAR, LAW AND LAND 278 (1964).

> to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence.[9]

The court below considered the force of this holding diminished by the later case of *Stephenson* v. *Binford*, 287 U.S. 251 (1932). It is quite true that on a very similar state of facts, *Stephenson* reached a result contrary to *Frost*. But this was not because of any shift in the thinking of the Court on the doctrine of unconstitutional conditions. Rather, it was because the Court had now reached the conclusion that the precise condition there in question—the right of private carriers to use the highways without a permit comparable to that obtained by common carriers—no longer could be viewed as requiring a surrender of constitutional rights. This conclusion in no way undercut the holding that if a constitutional right *is* involved, the

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[9] See also *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922), in which this Court struck down a state requirement that as a condition precedent to doing business within the state, a foreign corporation must agree to waive its right to transfer a suit to a federal court. Another leading case is *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1 (1910), in which it was held that the right of Western Union to do business in Kansas could not be conditioned upon payment of a franchise tax which burdened the company's interstate activities. This result was reached over the objection of Mr. Justice Holmes that the power to exclude foreign corporations gave the state the power to impose any conditions it saw fit. *Id.* at 53, 54-55.

surrender of it cannot be made a condition to governmental action.[10]

There can be no doubt about the constitutional right involved in this case. The ownership of private property is such a right, and the taking of it must conform to constitutional standards. This Court has emphasized time and again that the taking of property requires just compensation, even where the need for taking is of the greatest moment.

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. [*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922).]

The only serious question presented to this Court in recent years, therefore, has not been whether a taking requires compensation but whether there has in fact been a taking.[11] Similarly, one of the root issues in this case is not the desirability of allocating portions of subdivided property for parks, playgrounds and the like, but rather whether the City can by-pass the requirement that a compulsory taking—as this was—requires payment in return.

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[10] This is the interpretation of *Frost* given by recent authorities. *E.g.*, *Bynum* v. *Schiro*, 219 F. Supp. 204, 210 (E.D. La. 1963), *aff'd*, 375 U.S. 395 (1964); *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885 (1946); Note, 28 Ind. L.J. 520, 525 n. 22 (1953). See also *Cantwell* v. *Connecticut*, 310 U.S. 296, 306-307 (1940).

[11] *E.g.*, *Cf. Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 593-599 (1962), with *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960).

We submit, as the responsible commentators in the field have concluded,[12] that a city cannot force the relinquishment of a right by refusing to exercise its various governmental duties. On the contrary, a refusal conditioned on the giving up of property violates two sections of the Constitution. It violates due process because it is a mandatory taking without just compensation, and it constitutes a denial of equal protection of the laws because it treats the uncompensated property owner differently than those whose property has not been taken.

The fear expressed by this Court in *Frost* that conditioning governmental benefits upon the surrender of constitutional rights could result in the manipulation of those rights out of existence has even more validity today than it did in 1926, due to the rapid rise in the total number of governmental benefits extended. This is especially true in the area of municipal subdivision control, where official approval is increasingly being required before business steps can be taken. See, *e.g.*, Kratovil, Some New Developments and Trends in Real Property Law, 43 Title News, 2 (Aug. 1964), and Note, 28 Ind. L.J. 520 (1953). If the usual constitutional guaranties can be ignored when municipal planners impose conditions on land use and development, then these guaranties are in very real danger, so that the doctrine of unconstitutional conditions should have even greater force and application here than in the ordinary business situation. See Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595, 1595-96 (1960). This is particularly true where, as one commentator has

[12] See, *e.g.*, French, Unconstitutional Conditions: An Analysis, 50 Geo. L.J. 234 (1961); Note, 73 Harv. L. Rev. 1595 (1960); Note, 28 Ind. L.J. 520 (1953).

pointed out, the power to impose unconstitutional conditions cannot be implied from the power to withhold the benefit or privilege altogether. French, *supra* n. 12, 50 Geo. L.J. at 236-239.

Probably the most definitive analysis of the doctrine is that given in Note, 73 Harv. L. Rev. 1595 (1960), which concludes in part that "the power to impose conditions is not a lesser part of the greater power to withhold, but instead is a distinct exercise of power which must find its own justification." *Id.* at 1609. Two forceful arguments are made in the Note. One is that to deny a benefit (*e.g.*, the right to subdivide) unless a constitutional right is given up (*e.g.*, the right to retain your property unless you are given just compensation) in effect penalizes the exercise of that right, and to punish constitutionally-protected activities is a denial of substantive due process. *Id.* at 1599-1600. The other is that to exclude from participation in a certain activity (*e.g.*, subdivision of land) those who wish to retain their constitutional rights is an unreasonable classification in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1600.

Thus, here again this case would present serious issues even if it involved only a simple conditioning of municipal license on the payment of money. But the facts here demonstrate a far more serious use of governmental power, for the benefit withheld from Kitty Hawk was not merely one which Kitty Hawk would have liked to obtain—for example, shrubbery needed to improve the scenic appearance of the property and bought more cheaply from the City than from others. Instead, one of the benefits withheld by the City—water—was the very lifeblood of the property, without which the property was worthless,

and *only* the City could supply the benefit. The City in practical effect held the use of this property within its own control, and it forced the owner to give up part of the property without just compensation before it would release the property for use.

Even if we were to assume—which we do not—that the City had the right to grant or withhold *annexation* upon any condition it chose, on the theory that the City bore no duty to property located outside its borders, *once annexation was granted* this property became as much a part of the city as land that had been there from the City's inception. Once annexation occurred, the duty of the City was clearly established. Yet it was subsequent to annexation that the City required Kitty Hawk to comply with the ordinance and to surrender more than $25,000.00 in land value.[18]

That is why the doctrine of "business compulsion," explained so carefully by the dissenting Justice below, has several dimensions in this case. It is the complete answer to any idea that Kitty Hawk "waived" its constitutional rights, that it is "estopped" from asserting them, or that this case involves no more than an arms-length "agreement" between two parties. The doctrine also helps to define the true nature of the coercion and duress employed by the City, which exercised its absolutely essential governmental functions

[18] Kitty Hawk wants to make clear that it is not questioning the original grant to the City of power over water, annexation and subdivision. But the cases are quite positive that a legitimate power, when used in a way not intended by the grant, can become unlawful. Here, the power given to the City over water, annexation and subdivision were never intended to be used to force the surrender of property. The cases are collected in Dalzell, "Duress by Economic Pressure," 20 N.C.L. Rev. 237, 341 (see his conclusions at 361-367) (1942).

only on condition that Kitty Hawk give up its property without compensation. It was not necessary to our position that this element of coercion be in the case; the unconstitutionality attached as soon as the City even put Kitty Hawk to a choice between receiving municipal services or giving up its land.[14] But the way in which the City chose not to give just compensation and instead actually denied three of its powers, so that Kitty Hawk had no real choice but to accept the City's conditions, makes this a particularly clear case of constitutional deprivation.

It was why the dissenting Justice was moved to call the opinion of the Colorado Supreme Court "the longest and most dangerous step yet taken by this court in the general direction of emasculation and destruction of property rights as those rights have been heretofore protected by provisions of the Constitutions of Colorado and the United States."

Respectfully submitted,

ROBERT DUNLAP
Cool & Phillips
Mining Exchange Building
Colorado Springs, Colorado

E. BARRETT PRETTYMAN, JR.
Hogan & Hartson
800 Colorado Building
Washington 5, D. C.

Attorneys for the Appellant Kitty Hawk Development Company

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[14] French, *supra* n. 12, 50 Geo. L.J. at 248 n. 45.

APPENDIX A

IN THE DISTRICT COURT WITHIN AND FOR THE COUNTY OF EL PASO AND STATE OF COLORADO

Civil Action No. 40916

KITTY HAWK DEVELOPMENT Co., a corporation, *Plaintiff*,

vs.

THE CITY OF COLORADO SPRINGS, a municipal corporation, *Defendant*.

IN THE DISTRICT COURT WITHIN AND FOR THE COUNTY OF EL PASO AND STATE OF COLORADO

Civil Action No. 40916

KITTY HAWK DEVELOPMENT Co., a corporation, *Plaintiff*,

vs.

THE CITY OF COLORADO SPRINGS, a municipal corporation, *Defendant*.

Findings of Fact and Conclusions of Law

This cause coming on regularly for trial to the Court on the 16th day of October, 1962, the plaintiff appearing by H. T. McGarry and Robert Dunlap as its attorneys, and the defendant appearing by F. T. Henry and Louis Johnson, its attorneys. The evidence and arguments of counsel continuing to October 19, 1962, at which time the Court took the matter under advisement. And the Court being now advised in the premises, FINDS:

That in 1954 plaintiff purchased a large tract of land situate in El Paso County, Colorado, outside of and contiguous to the City Limits of the City of Colorado Springs; that this tract was purchased for subdivision purposes and was annexed to the defendant City on March 8, 1955; that, at that time, an ordinance entitled: "An Ordinance to Regulate the Subdivision of Land, to provide for the Layout and Platting of Subdivisions, to Provide for a Street Plan and System, and Installation and Control of Public Utilities, Public Improvements and Safety Facilities, to make Provision for Public Spaces and to Avoid Congestion in Population" known as No. 1987 was in full force and effect, and provided: (Article II, Section 2, E (1))

> ALLOCATION OF LAND FOR PUBLIC SPACES: The owner of the land in each subdivision shall allocate and convey (eight) per cent of the area of the land in his subdivision, exclusive of streets and alleys, for park, playgrounds, schools, recreational or similar public purposes, at such location as designated by the City, or at the option of the City, said owner, shall in lieu of such conveyance of land in kind, pay to the City in cash an amount equal to (eight) per cent of the value of the land. If the City and the owner fail to agree on the value of said land, such value shall be fixed and established by the Real Estate Appraisal Committee of the Colorado Springs Board of Realtors. The proceeds of said payments shall be deposited in a separate City account and shall be used only for the acquisition of land for parks, playgrounds, schools, recreational or similar public purposes."

THE COURT FURTHER FINDS that on August 12, 1955 the plaintiff paid to the defendant $25,378.08 as required by Ordinance No. 1987 as amended, and such payment was in lieu of any conveyance of land.

Plaintiff's demand in this action for the return of money paid under Ordinance No. 1987 to the defendant requires

that the validity or constitutionality of the said ordinance be resolved in order to determine this question.

THE COURT FINDS that the said ordinance goes beyond a regulatory matter embraced within the police powers of the defendant and provides for the taking of property without due process of law in violation of Article II, Section 3 of the Constitution of the State of Colorado; usurps a judicial function in that it prohibits the determination of the value of the land by judicial process, leaving such valuation to a commission without benefit of appeal, and that it violates Article II, Section 25 of the Constitution of the State of Colorado; and that it places an unequal burden of tax upon the plaintiff.

THE COURT FINDS that plaintiff has not by agreement or waiver, lost its right to attack the validity or constitutionality of this ordinance and that any purported consideration by reason of agreement to waive its right to question the validity or constitutionality of the ordinance is contrary to public policy and a violation of Article II, Section 6 of the Constitution of the State of Colorado wherein it is provided that for every wrong there shall be a right and that right and justice should be administered without sale, denial or delay.

The Court concludes, as a matter of law, that the payment made by the plaintiff, Kitty Hawk Development Co., a corporation, to the defendant, The City of Colorado Springs, a Municipal Corporation, was made under an invalid and unconstitutional ordinance and that the plaintiff is entitled to the return of its money, and a judgment in accordance with these Findings shall be prepared by counsel for the plaintiff and presented to the Court within ten days, including therein the statement that a motion for new trial, if filed, would be denied.

Done by the Court in Chambers this 7th day of November, 1962.

WILLIAM M. CALVERT
Judge

THE CITY OF COLORADO SPRINGS, a municipal corporation,
Plaintiff in Error,

v.

KITTY HAWK DEVELOPMENT CO., a corporation,
Defendant in Error.

No. 20615

Supreme Court of Colorado
En Banc

May 4, 1964

Rehearing Denied June 8, 1964

PRINGLE, Justice.

Defendant in error, Kitty Hawk Development Company, hereinafter designated as plaintiff or Kitty Hawk, instituted this action against the plaintiff in error, City of Colorado Springs, hereinafter designated as defendant or City, to recover the sum of $25,378.08 paid by it to the City. It alleged that the payment was made pursuant to Section 2 E(1) of the City's Subdivision Ordinance, No. 1987, as amended and that the said section was unconstitutional, specifying numerous grounds therefor. Trial was to the court and at the conclusion thereof the court rendered judgment for plaintiff in the amount claimed, together with interest, and declared said Section 2E(1) unconstitutional on the grounds, among other things, that it (1) provides for the taking of property without due process of law in violation of Article II, Section 25 of the Constitution of the State of Colorado; (2) violates Article II, Section 3 of the Constitution of the State of Colorado; (3) usurps a judicial function in that it prohibits the determination of the value of land by judicial process, leaving such valuation to a commission without benefit of appeal; and (4) places an unequal burden of tax upon the plaintiff. From this judgment, the City brings error.

Section 2E(1) of the City's Subdivision Ordinance reads as follows:

> "*Allocation of Land for Public Spaces.* The owner of the land in each subdivision shall allocate and convey eight per cent of the area of the land in his subdivision, exclusive of streets and alleys, for park, playgrounds, schools, recreational or similar public purposes, at such location as designated by the City or at the option of the City, said owner, shall in lieu of such conveyance of land in kind, pay to the City in cash an amount equal to eight per cent of the value of the land. If the City and the owner fail to agree on the value of said land, such value shall be fixed and established by the Real Estate Appraisal Committee of the Colorado Springs Board of Realtors. The proceeds of said payments shall be deposited in a separate City account and shall be used only for the acquisition of land for parks, playgrounds, schools, recreational or similar public purposes. The provisions of this ordinance shall be applicable to each area, territory, subdivision or addition which is being, or is hereafter annexed to the City of Colorado Springs to the end that there shall be allocated or paid to the City of Colorado Springs the eight per cent in land or value thereof in dollars as herein provided. To the extent that public uses or areas have been provided in said area or territory annexed to the City, such uses or areas may receive credit at the option of the City to the extent applicable upon the eight per cent allocation of land or equivalent value in dollars thereof."

Of utmost importance in resolving the issues raised by this writ of error is a thorough understanding of the circumstances under which the payment of $25,378.08 was made by Kitty Hawk to the City.

In 1954, Kitty Hawk was incorporated for the sole and exclusive purpose of acquiring and subdividing a large

tract of land contiguous to the City and owned by one Ruby von Rosenberg Menzer. Robert Morrison, president and a major stockholder of the plaintiff, "did practically everything" in regard to the mechanics of development. Morrison had served in an executive capacity in several other large real estate developments in Colorado and was a seasoned businessman with many years of practical experience in the field of real estate and land subdivision.

On August 10, 1954, the plaintiff entered into a contract with Menzer for the purchase of her land, the total purchase price being $442,215.00. The contract called for the payment of $10,000.00 upon execution and further payments in installments to be made in part "* * * *upon arrangements being completed with the City of Colorado Springs to furnish utilities for said land,* * * *." (Emphasis supplied)

On August 23, 1954, the contract was amended in pertinent part as follows:

> "It is understood that purchaser shall use due diligence to have said property legally and properly zoned, the plat to said land approved and *arrangements completed for the installation of utilities with the City of Colorado Springs, Colorado, but in the event that said purchaser is unable to obtain said platting, zoning and arrangements for utilities, then this contract shall become null and void and the payment made hereunder as provided in Paragraph 1, Sub-paragraph A, Page 2 shall be returned to purchaser.*" (Emphasis supplied)

On February 18, 1955, the contract was supplemented, said supplement containing the following recitals:

> "WHEREAS in and by said contract it was contemplated that said lands be platted as a subdivision in El Paso County and that utilities be acquired by agreement with the City of Colorado Springs, and

"WHEREAS the said City of Colorado Springs has refused to furnish said utilities unless and until said property is annexed to said City of Colorado Springs, and

"WHEREAS the proper officers of the said City of Colorado Springs have authorized the annexation of said land to said City of Colorado Springs and such annexation is now in the process of being accomplished, and

• • • • • • • • • •

"WHEREAS by reason thereof it is proper and necessary that said agreement be changed, altered and amended in the particulars hereinafter set forth and the parties hereto hereby mutually agree to such changes, alterations and amendments, to-wit:

"1. That sub-paragraph B of paragraph 1 of said original contract as heretofore amended, be amended to read as follows:

"'B. On or before ten (10) days after said property shall be duly and properly annexed to the City of Colorado Springs and shall be zoned substantially in the manner and for the usages and purposes specifically described and set forth on the plat of said land as attached to the original contract and made a part thereof with the exception, however, that the portion of said land set off for usage as a shopping center shall at this time be rezoned for usages as residential property and *an agreement has been made with the City of Colorado Springs for the furnishing of utilities to said land*, then the Purchaser shall • • •.'" (Emphasis supplied)

In September, 1954, a plat of the Kitty Hawk Subdivision had been approved by the Planning Commission and the Board of County Commissioners of El Paso County. On

March 8, 1955, the Subdivision was annexed to the City by Ordinance 2204, which provided in pertinent part:

> "• • • provided, however, that said territory is subject to all ordinances of the City of Colorado Springs, relating to the extension of Utilities, the Subdivision of said territory and any and all other ordinances in any way effecting (sic) said land and territory."

Subsequent to annexation, a plat of the Subdivision was approved by the City and thereafter, on August 12, 1955, the plaintiff paid $25,378.08 to the City.

Before the trial, the parties stipulated that subsequent to the annexation, water and sewer lines and other utilities were installed in the Kitty Hawk Subdivision; that streets have been built and other municipal services, including fire and police services, have been furnished. Houses have been built and sold by various contractors on a substantial portion of the lots within the Subdivision.

At the trial, the only witness called by the plaintiff on its case-in-chief was Robert Morrison. He testified that among the factors he considered in deciding whether a particular subdivision would amount to a profitable investment were the costs of curbs and gutters, sidewalks, water, sewer, gas and electrical services. He testified further that investigations were made as to these costs in relation to the Kitty Hawk Subdivision both before and after signing the contract for the purchase of the land from Menzer.

The record discloses that Morrison and his associates did not originally intend to seek annexation of Kitty Hawk Subdivision to the City, but preferred instead to remain in the County of El Paso. After the County had approved of the plat of the Subdivision, plaintiff's representatives were informed by an employee of the City that water and sewer services would not be forthcoming from the City

unless and until the Subdivision was annexed, and they were further informed that if the plaintiff chose to annex, it would be required to make payment to the City in a sum equivalent to eight per cent of the appraised value of the Subdivision, this being the percentage expressly stated in Section 2E(1) of the City's Subdivision Ordinance set out above.

Prior to annexation, Morrison was advised by his attorney that, in his opinion, the City's position on water was not legally correct and that the same could be obtained without annexation, but that this would entail lengthy and costly litigation. Thereafter, Morrison held several meetings with plaintiff's Board of Directors, at which the cost of annexation in order to obtain the needed water and sewer services was discussed. At this point it was estimated that the payment required would be in the neighborhood of $20,000.00 or $25,000.00 and the Board of Directors "gave very serious consideration to just dropping the thing and walking away and leaving it." Instead, the Board of Directors decided to proceed with the Kitty Hawk Subdivision, with full knowledge of the payment which the plaintiff would be required to make in order to secure annexation to the City and acquire the needed water and sewer services. A material factor in this decision was the development of the Air Force Academy near the City, which Morrison and his associates contemplated would substantially add to their profits.

This suit to recover the payment of $25,378.08 was instituted on April 14, 1961, almost six years after the payment was made. The record discloses the following:

> "Q. Mr. Morrison, can you tell us why you waited until 1961 to file suit on this thing?
>
> . . . . . .
>
> "A. Yes. About two years ago I was in Mr. Cool's office and we were discussing other legal matters and

he asked me at that time, 'Did you pay a subdivision fee to the City?' I said yes. 'What was it', he said, and I said 'It was about twenty-five thousand dollars. It was eight per cent of their appraisement'. And he said, 'Did you know that there was some litigation as to whether that fee was legal or not?' and I said 'No'. And he says 'There seems to be a little question about that'. And at that time I asked them, 'Why don't you look into it and find out? If it is illegal, I didn't want to pay it.' I just took it for granted—unless I wanted to go into litigation on that water deal. But that would have taken a long time.

"Q. So I take it you were satisfied with your arrangement and deal with the City until it was mentioned by Mr. Cool?

"A. I wasn't satisfied but I had to do it.

"Q. You had made an agreement and you were satisfied with it, is that right?

"A. I wasn't satisfied but I had made an agreement and I had to sell the ground—and I had to have the utilities."

In our view, it is not necessary under the circumstances of this case to determine the constitutionality of Section 2E(1) of the City's Subdivision Ordinance, since the plaintiff is precluded by other matters appearing in the record from recovering that which it sought. We have consistently held that when a controversy can be decided upon other grounds, we will make no inquiry concerning the constitutionality of a statute. See State ex rel. Cruse v. American Can Co., 117 Colo. 312, 186 P.2d 779.

The testimony of Robert Morrison himself and the documentary evidence establishes beyond question that:

(1) The plaintiff was in need of water and sewer services from the City, but preferred not to annex to the City;

(2) Plaintiff could obtain City water and sewer services only in the event of annexation of the Kitty Hawk Subdivision to the City;

(3) The City conditioned annexation upon payment by the plaintiff to the City of an amount equal to eight per cent of the appraised valuation of the Subdivision;

(4) The plaintiff agreed to annex to the City and to make the payment required by the City so that it might receive water and sewer services;

(5) Water and sewer services were supplied plaintiff upon annexation and the payment of $25,378.08.

It is now well established in this state that a city is under no obligation to sell or furnish water or sewer services to anyone outside its corporate limits, but, if it elects to do so, it acts in a proprietary capacity, and the relationship entered into between a city as a supplier and such users is purely contractual. City of Englewood v. City and County of Denver, 123 Colo. 290, 229 P.2d 667; City of Colorado Springs v. P. U. C., 126 Colo. 265, 248 P.2d 311; Lee v. City of Colorado Springs, 136 Colo. 248, 315 P.2d 822 (cert. denied) 355 U.S. 955, 78 S.Ct. 541, 2 L.Ed.2d 531. Pertinent here is a quotation from the City of Fort Collins v. Park View Pipe Line, 139 Colo. 119, 336 P.2d 716 where this Court approved the following language from City of Phoenix v Kasun, 54 Ariz. 470, 97 P.2d 210:

> "After a careful consideration of all the authorities, we are of the opinion that the controlling factors in the present case are that the city was under no obligation, as a matter of law, to furnish any service to the plaintiffs; that the relationship between them was purely contractual in its nature, and that such being the case, the reasonableness or unreasonableness of the rates fixed by the contract are not subject to review by the court. The only right which it has under the circumstances is to determine whether the city is complying with the terms of its contract, * * *."

No governmental power was bargained for here, nor was any constitutional right surrendered, for plaintiff had no

constitutional or statutory right to receive water and sewer services from the defendant. Nor is it material that the consideration which the City required in return for furnishing such water and sewer services was annexation and the payment of an amount equal to that required by Section 2E(1) after the plaintiff was annexed. Though Section 2E(1) was used by the parties as the method of computing the amount demanded by the City for water and sewer services and for determining the time of payment, such fact does not affect the validity of the contract. Both parties knew approximately what the figure would be before plaintiff agreed to annex. Morrison discussed it with plaintiff's Board of Directors and after much discussion they agreed to proceed on the terms outlined by the City because, as Morrison testified, "it was smart," [it was] "a good business venture."

Much is made in the plaintiff's brief of "business compulsion." In the instant case the implications of that doctrine are not applicable. The only "compulsion"—legal or otherwise—serving to motivate Morrison and his associates was the desire to make a profit on the Kitty Hawk Subdivision. In order to do this, water and sewer services were essential. The City was under no obligation to furnish these services for property without the City's corporate limits. The plaintiff wanted water and sewer services; the City required annexation and a sum of money equal to eight per cent of the appraised value of the property. Each got what it bargained for. Morrison's own testimony is that up to the time this decision was made Kitty Hawk was under no legal obligation to purchase the property or to proceed with its subdivision plans. In such circumstances, the equities clearly do not lie with the plaintiff. We see no reason, legal or moral, why the plaintiff should have all of the benefits of its bargain by which it obtained the water and sewer services it needed in order to carry out its plans, and yet receive back from the City

a portion of the consideration which it gave in order to obtain these services, which the City was under no constitutional or statutory obligation to furnish.

We find nothing in the general law of this state or in the Constitution prohibiting the imposition of conditions by a municipality upon one seeking annexation. A municipality is under no legal obligation in the first instance to annex contiguous territory, and may reject a petition for annexation for no reason at all. It follows then that if the municipality elects to accept such territory solely as a matter of its discretion, it may impose such conditions by way of agreement as it sees fit. If the party seeking annexation does not wish to annex under the conditions imposed, he is free to withdraw his petition to annex and remain without the city. Annexation can take place only when the minds of the city and the owners of the land contiguous to the city agree that the property shall be annexed and upon the terms upon which such annexation can be accomplished.

In Schlarb v. North Suburban Sanitation District, 144 Colo. 590, 357 P.2d 647, the plaintiff brought an action to recover a sum of money paid to the defendant district as a condition of having his property annexed to the district. Judgment was rendered for the defendant and in affirming the judgment this Court employed the following language which we think fully applicable to the instant case:

> "• • • Such corporation has no obligation or duty to furnish service to owners of land outside the district. The relationship between plaintiff and defendant was purely contractual. *Such being the case the reasonableness of the conditions or terms of inclusion within the area so as to reap the benefits of the sanitation services is not subject to review by the courts.* The courts may only determine whether the district complied with the terms of the contract. City of Englewood v. City and County of Denver, 123 Colo. 290, 229

P.2d 667; City of Ft. Collins v. Park View Pipe Line, 139 Colo. 119, 336 P.2d 716." (Emphasis supplied.)

The plaintiff relies heavily on an excerpt from Frost v. Railroad Commission of the State of California, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101, in support of its position that the City could not impose conditions upon annexation even though the City had the right to withhold annexation if it wished to do so. In our view, the language from Frost relied upon by the plaintiff is not pertinent to the questions presented here, when we view that language in its context and in the light of the fact situation in that case, and, indeed, in the light of a case decided just six years later by the Supreme Court of the United States, Stephenson v. Binford, 287 U.S. 251, 53 S.Ct. 181, 77 L.Ed. 288.

In Frost, the California Supreme Court had itself determined that an amendment to its public carrier law required private carriers already in existence and operating upon the highways of California to change their operation to public carrier service if they wished to continue in business. This the Supreme Court of the United States held California had no power to do, and in that context the language upon which the plaintiff relies was written. In Stephenson, supra, through an opinion written by the same justice who wrote Frost, the Court held that it was perfectly proper for a state to require a private carrier who had been in business prior to the enactment of a private carrier statute to obtain a permit and be regulated if it wished to continue its business as a condition of using the highways of the State of Texas. The Court pointed out that its decision in Frost rested solely on California's interpretation that the new law required a private carrier to become a public carrier if it wished to continue in business.

Plaintiff asserts that the agreement between it and the City was *ultra vires*. Assuming, arguendo, that this is so,

this is no help to the plaintiff since it is estopped to assert such fact, having received and retained the benefits conferred thereunder, and the contract being fully executed on the part of all parties. See Stewart v. Board of Com'rs of Phillips County, 80 Colo. 232, 250 P. 562; Bainbrich v. Boies, 113 Colo. 458, 158 P.2d 736; Aberdeen Bldg. Corp. v. Rickfords, 123 Colo. 484, 232 P.2d 183; Mayor of the City of New York v. Sonneborn, 113 N.Y. 423, 21 N.E. 121; 10 McQuillen Municipal Corporations, 3d Ed., Sec. 29.133, p. 509; Anno. 122 A.L.R. 1370.

The judgment is reversed and the cause remanded with instructions to dismiss the complaint.

MOORE, J., dissenting.

McWILLIAMS, C. J., and SUTTON, J., not participating.

MOORE, Justice (dissenting).

It is my firm belief that the majority opinion amounts to the longest and most dangerous step yet taken by this court in the general direction of emasculation and destruction of property rights as those rights have been heretofore protected by provisions of the Constitutions of Colorado and the United States. My conviction that the majority opinion is destructive of basic constitutional rights is so deep-seated that I am compelled to express my views at some length and with such force as I am able to command, even though my effort fails to halt the emasculation of constitutional limitations upon the power of government to control the lives of the people and to deprive them of their property and the use thereof. My statement of the facts in the instant case involves some repetition of matters set forth by Mr. Justice Pringle, but I prefer to mention them in proper sequence as they relate to the issues actually argued by counsel, most of which are not mentioned in the "majority" opinion.

The Kitty Hawk Development Co., to which I refer as the Company, was plaintiff at the trial court, and the city of Colorado Springs hereinafter referred to as the City was the defendant. The action was brought to recover moneys "had and received" by the City because of payment by the Company of a certain subdivision fee exacted illegally by the City as a condition for annexation to the municipality. To a judgment in favor of the Company, the City directs this writ of error.

In the summer of 1954 representatives of the Company began negotiations for the purchase of approximately 100 acres of land adjacent to the City with the intent to create thereon a subdivision for residence and business purposes, including, inter alia, platting the land and the installation of streets, curbs, gutters, sidewalks, and utilities. The Company finally entered into a contract for the purchase of the property agreeing to pay the sum of $142,215.00 for the land. The contract provided that seller should apply to the city and county officials for plat approval of the subdivision, *but the Company should pay all expenses of the platting and procedures for approval.*

A few days after its execution the contract was amended concerning some time limitations, to include the following:

> "*It is understood that purchaser shall use due diligence to have* said property legally and properly zoned, the plat to said land approved *and arrangements completed for the installation of utilities with the City of Colorado Springs, Colorado, but in the event that said purchaser is unable to obtain said platting, zoning and arrangements for utilities, then this contract shall become null and void* and the payment made hereunder as provided in Paragraph 1, Sub-paragraph A, Page 2 shall be returned to purchaser." (Emphasis supplied)

The contract was later amended and supplemented on February 18, 1955, the amendment containing recitals that

the City had refused to furnish utilities unless the land was annexed to the City; that such annexation was in progress and that certain zoning arrangements for the land had been agreed upon with the City. At the time of entering into the contract to purchase the land, the City of Colorado Springs was acting as a public utility in the furnishing of gas and electrical services within the area of said land but was not acting as a public utility and was under no obligation to furnish sewer or water services in the area.

At all times pertinent to the controversy there was in effect in the City an ordinance No. 1987, known generally as the Subdivision Ordinance, Section 2-E of this ordinance provided in pertinent part the following:

> "The owner of the land in each subdivision shall allocate and convey eight per cent of the area of the land in his subdivision, exclusive of streets and alleys, for park, playgrounds, school, recreational or similar public purposes, at such location as designated by the City or at the option of the City, said owner, shall in lieu of such conveyance of land in kind, pay to the City in cash an amount equal to eight per cent of the value of the land. * * * The proceeds of said payments shall be deposited in a separate City account and shall be used only for the acquisition of land for parks playgrounds, schools, recreational or similar public purposes. The provisions of this ordinance shall be applicable to each area, territory, subdivision or addition which is being, or is hereafter, annexed to the City of Colorado Springs to the end that there shall be allocated or paid to the City of Colorado Springs the eight per cent in land or value thereof in dollars as herein provided. * * *"

In September, 1954, a plat of Kitty Hawk Subdivision was approved by the Planning Commission and the Board of County Commissioners of El Paso county. At that time

a planning engineer employed by the City informed the president of the Company that water and sewer services would not be furnished in the subdivision unless it was annexed to the City, and that upon annexation the area would be subject to various municipal ordinances including the subdivision ordinance above quoted in part.

Having been advised of these various requirements and having met with City officials and commissions regarding what street and zone changes in the subdivision would be acceptable to the City, the president of the Company conferred with its Board of Directors to decide whether or not they should proceed with the contract, annex to the City, and comply with the requirements of the subdivision ordinance. The payment which would be required by the City was estimated at from twenty to twenty-five thousand dollars. During the meeting the Board "gave very serious consideration to just dropping the thing." However, at that time approximately $12,000.00 had already been expended which would have been a total loss, and the Company was vulnerable to a suit for specific performance of its contract to purchase the property since it had agreed to do the necessary things to acquire utilities from the city. The Company was placed in a position in which it was required to give eight percent of its property to the City, or abandon its opportunity to profit from the enterprise and in so doing take a loss of the amount already spent and run the risks involved in a possible suit for specific performance. After analyzing all the factors concerned, the Company decided to proceed with the project, and further amendments to the contract to meet the new situations were consummated with the sellers.

March 8, 1955, the annexation of the land known as Kitty Hawk Subdivision was completed by Ordinance No. 2204 of the City. Said ordinance contained the following provision:

"• • • provided, however, that said territory is subject to all ordinances of the City of Colorado Springs,

relating to the extension of Utilities, the Subdivision of said territory and any and all other ordinances in any way affecting said land and territory."

At this point in the factual statement I pause to comment as follows: The above language could not possibly give validity to the subdivision ordinance as applied to the land annexed when said subdivision ordinance is unquestionably unconstitutional as applied to property already within the city. It is clear from numerous decisions of courts of last resort throughout the country, that as applied to land within the city limits the eight percent forfeiture clause of the subdivision ordinance is unconstitutional.

Every citizen has a right to enter into a lawful business activity and make substantial initial capital investments to develop the same on the basis that no agency of government will make an unconstitutional demand upon him to surrender eight percent of his property for public use without compensation, under the threat that if he refuses to do so he will suffer an absolute loss of his initial investment, and be required to abandon a project which held excellent prospects for profit, and in addition thereto subject himself to probable litigation for specific performance of a contract involving the expenditures of about half a million dollars. The business compulsion under which the Company "agreed" to give up eight percent of its property is clearly shown. There is no dispute in the evidence with regard thereto, and yet the opinion to which this dissent is directed makes the startling statement that:

"Much is made in the plaintiff's brief of 'business compulsion.' In the instant case the implications of that doctrine are not applicable. The only 'compulsion'—legal or otherwise—serving to motivate Morrison and his associates was the desire to make a profit on the Kitty Hawk Subdivision."

This statement shows scant understanding of the well-established doctrine of "business compulsion" as will be shown later in some detail.

Mr. Morrison, speaking for the Company, testified in this connection in pertinent part as follows:

> "Q. So I take it you were satisfied with your arrangement and deal with the City until it was mentioned by Mr. Cool?
>
> "A. I wasn't satisfied *but I had to do it.*"
>
> "Q. You had made an agreement and you were satisfied with it, is that right?
>
> "A. I wasn't satisfied, but I had made an agreement and I had to sell the ground—and I had to have the utilities." (Emphasis supplied)

The inference from the statement above quoted from the opinion which gives a quick "brushoff" to the all important question of business compulsion, is that the "motive" of the Company to earn a profit is not a laudable motive. With this inference I emphatically disagree. The "opinion" indicates that if all a person would be called upon to surrender by refusing to comply with an unconstitutional demand, is the opportunity to make a substantial profit on an enterprise involving very large sums of money, then the doctrine of business compulsion is inapplicable. Exactly the opposite is true under all the modern authorities!

I now return to the facts. Following adoption of the annexation ordinance the plat of Kitty Hawk Subdivision was approved by the city council. This plat reflected certain changes in the original county plat with reference to streets, all as agreed upon by the Company and the City prior to annexation. The new plat contained the statement that the area included therein was, "• • • subject to all ordinances of the City of Colorado Springs, relating to the extension of utilities, the subdivision of said territory and

any and all other ordinances in any way affecting said land and territory."

After approval of the plat the Company paid to the City the sum of $25,378.08 pursuant to ordinance 1987-2-E hereinabove quoted. This payment was made August 12, 1955, after which the Company received water and sewer connections and services for which it paid established charges payable by other users. At the expense of the Company water and sewer lines were constructed in the addition, other utilities have been installed, streets have been built and homes have been built on a substantial portion of the lots in the subdivision. Municipal services including fire and police protection have been furnished.

On April 14, 1961 (more than six years after the annexation to the City, but less than six years from the date the "public space fee" of $25,278.08 was paid to the City) the Company filed its complaint to recover that sum with interest. In its complaint the Company alleged the facts hereinabove stated, and also asserted that the City would not approve the plat and furnish utilities to the subdivision except on the condition that the subdivision be annexed to the City and the Company pay the City the 8% fee of $25,378.08 based upon the appraised value of the land, in compliance with Section 2-E(1) of the Subdivision Ordinance No. 1987; and that the Company paid the aforesaid amount to the City, but the payment thereof and the annexation of the land to the City were done involuntarily by the Company to secure approval of the plat and were induced by economic duress and business compulsion by reason of the monopolistic control of utility services by the City and by its invoking its requirement for the payment of the 8% under its subdivision ordinance. The complaint then recites that Section 2-E(1) of Ordinance No. 1987 is unconstitutional and invalid for a number of reasons and that by reason thereof the Company is entitled to the return of its payment, with interest.

The City answered and pleaded lack of jurisdiction, failure of the complaint to state a claim, laches and the statute of limitations. It admitted that the Kitty Hawk Subdivision was annexed to the City; that the ordinance and statutes mentioned in the complaint were in force at the times mentioned; that a plat of the subdivision was, prior to annexation, approved by the county, and a modified plat thereof was approved by the City on March 22, 1955, after annexation; and that the area covered by the plat was specifically made subject to the ordinances of the City as indicated thereon. The City further admitted that the Company prior to annexation was informed that to obtain water and sewer services the subdivision must be annexed, and that after annexation the Company must comply with various ordinances affecting the subdivision, including the payment of the subdivision fee under Ordinance No. 1987. The payment of the fee of $25,378.08 on August 12, 1955, was admitted and all other allegations of the complaint denied.

Affirmatively, the City alleged as a defense that during the time the land was outside the City there was no obligation on its part to annex the land or furnish it water or sewer; that prior to annexation Ordinance No. 1987 had no application to the land excepting what applicability it had thereto concerning a major street plan; that with full knowledge of the fact that the City would not serve the area with water and sewer connections unless it was annexed to the City, and unless the Company complied with the payment of the fees required by Ordinance No. 1987, the Company accepted the said conditions and caused the territory to be annexed to the City which accepted it upon said conditions and understanding. The City further alleged that the Company was estopped to rescind the "agreement and condition" upon which annexation was accomplished. Pertinent facts were placed before the trial court on stipulation, and evidence in addition thereto was presented. The trial court found the issues of fact and of

law, as contended for by the Company, and entered judgment accordingly. The City is here on writ of error seeking reversal.

The argument on behalf of the City is summarized under eight separate captions. Some of them are interrelated and do not require separate treatment.

The first question for consideration is whether Section 2-E of Ordinance No. 1987 violates the Constitution of the United States or of the State of Colorado. Counsel for the City argue that the ordinance in question, "* * * must be and can be sustained under the police power concept." They argue that zoning ordinances were "originally attacked upon the same constitutional ground as urged in the instant case." It is argued that, "All property is held in subordination to the police power"; and that what constitutes a legal regulation upon land changes with conditions, and that "concentration of population requires additional restrictions in respect to the use and occupation of land and that regulations now necessary would half a century ago have been regarded as arbitrary." Whether a "regulation" concerning the use and occupation of land is reasonable, as related to zoning laws, is a far different question than the one before us. Counsel for the City recognize the distinction and cite zoning cases only by way of analogy. They supplement the analogy with the following statement:

> "However, legislative requirements for compulsory dedications or conveyances of land for street and highway purposes do invoke such physical taking of the land of another."

The case of Ayres v. City Council of City of Los Angeles, 34 Cal.2d 31, 207 P.2d 1, 11 A.L.R.2d 503, in which the court held that when Ayres requested the platting and subdivision of lands owned by him he was required to comply with all reasonable conditions relating to width

of streets applicable to the area in order to provide for the safety of the public, is cited. I find no fault with this assertion. I agree with the statement of the Supreme Court of Maryland which said in Krieger v. Planning Commission of Howard County, 224 Md. 320, 167 A.2d 885:

> "Other courts have reached the conclusion that planning requirements under which developers record plats and obtain approval of roads and strips bordering on roads are within the police power and not compensable."

In the matter of dedication of streets to public use in connection with the voluntary request of a landowner that his land be accepted for development as a "subdivision" for residential purposes, we are dealing with a reasonable regulation imposed upon property concerning a proposed use, and said regulation has a definite relation to the public safety. If the proposed residential area is to be established, ingress and egress to the homes must be established and adequate ways for traffic through the area are an absolute necessity. There is no basis whatever for comparison between such a situation and an arbitrary demand for forfeiture of eight percent of the owner's land.

It is argued that park and recreation spaces have now become "necessary for the public health and welfare." It is said that: "It is well within the legislative prerogative to conclude that a park is as necessary for the public welfare as a wide street." The argument is that the requirement that a landowner give eight percent of his land, or eight percent of the appraised value of the land, for public purposes of this kind is a reasonable exercise of the police power. It is further argued as ground for reversal that annexation to a municipality is permissive, that a city is under no compulsion to accept a petition for annexation and therefore "the imposition of reasonable conditions precedent by a municipality for acceptance of a petition for annexation is not prohibited."

In opposition to the foregoing contentions of the City, the Company presents argument under numerous subcaptions. We direct attention to two of them as follows:

> First. "Article II, Section 2E(1), of Ordinance No. 1987, as amended by Ordinance No. 2179, is unconstitutional and violates Article II, Sections 3, 15, and 25, of the Colorado Constitution and Amendment XIV, Section 1, of the Federal Constitution."

The above cited Section 3 describes as an inalienable right the right of "acquiring, possessing and protecting property"; Section 15 provides in part that, "Private property shall not be taken or damaged, for public or private use, without just compensation"; and Section 25 provides that, "No person shall be deprived of life, liberty or property, without due process of law." The provision of the United States Constitution to which reference is made is the "due process" clause of that document.

> Second. "Article II, Section 2E(1), of the ordinance cannot be justified as an exercise of the police power."

We consider first the question of whether the subdivision ordinance of the City can be upheld when subjected to the test of the state constitution (Article II, Sec. 15) which provides that, "Private property shall not be taken or damaged, for public or private use, without just compensation." Resolution of this question involves consideration of the further question of whether the City, by agreement with the Company or by compelling compliance with the ordinance as a condition upon which annexation to the City would be accomplished, can lawfully exact the surrender of a constitutional right as a consideration for the exercise of a discretionary governmental power.

Reduced to essentials, the position of the City is that, notwithstanding that the ordinance purports to take private property for public use, without compensation, the

Company consented to enforcement of its terms in exchange for annexation and delivery of water and sewer service; that the City, in reliance on the consent of the Company, has granted annexation and provided water and sewer service; that annexation, water and sewer service were granted and furnished in exchange for compliance with an ordinance which takes private property for public purpose without compensation, and that by accepting annexation and water and sewer service under the admitted facts the Company cannot be heard to complain that their constitutional rights have been violated.

Throughout the brief of the City it is freely admitted that under the authority of the ordinance in question, property of the Company has been taken for a public purpose without compensation. The position of the City is that it bargained at arm's length with the Company and is entitled to keep what it bargained for, notwithstanding the constitution prohibits it from "bargaining" in the manner in which it did. The claim is made that the constitutional provision prohibiting such a taking is inapplicable to the instant case. With this contenton I cannot agree.

In Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919, the constitutionality of a zoning ordinance was before us, and the city of Denver sought to uphold a provision thereof requiring that a property owner set apart a substantial area of his property for the parking of cars as a condition to be met in putting his land to use for business purposes. Our opinion in that case contains much language which is applicable to this case. We quote therefrom the following:

"The legal effect of the argument of the City is that it has a problem of concentration of traffic in the streets and that accordingly there is a right, under the zoning ordinance, to appropriate for off-street parking substantial portions of property of citizens desiring to use that prop-

erty for a legitimate purpose, and to prohibit the use of that property for any purpose until its owners devote a substantial portion thereof to parking; * * * No such power exists in the city thus to take private property for a public purpose without compensation to the owner for the taking. It would be quite as proper to argue that the city had the right, under the guise of 'zoning' to require dedication of private property for the street itself, if it were considered that a given street was generally inadequate to carry the traffic; and to prohibit the use of property for any legitimate purpose until such dedication was made. If it be true that a traffic problem exists, it cannot be legally solved by confiscation of private property without compensation, under a pretense of 'zoning'."

The case now before us stands on an even stronger factual foundation than was shown in the case above cited. Here there is an outright taking of all right, title or interest of the property owner, or in lieu thereof a payment to the City of the cash value of the land which might have been acquired by the City had it elected to do so, whereas in Denver Buick, supra, the unconstitutional ordinance involved a purported police power regulation relating to the use of land. The regulation there attempted concerning the use of land, was held to be unreasonable and to result in a taking of private property for public use without compensation. Thus the arguments advanced by the dissenting justices in the Denver Buick case as grounds for upholding a police power "regulation on use" are not pertinent to the contention of the City in the instant case because here the whole interest in the property is confiscated by the City. In Pioneer Trust and Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E. 2d 799, a municipal ordinance required subdividers to dedicate a portion of their land for public use, without compensation. In holding the ordinance invalid the court said, inter alia:

> "Section 6 of Article II of the defendant village ordinance imposes an unreasonable condition precedent for the approval of a plat of a subdivision and purports to take private property for public use without compensation."

A similar situation was presented to the Supreme Court of Pennsylvania in Miller et ux. v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34. In holding the questioned ordinance unconstitutional the court said:

> "* * * If it (the City) desires plaintiffs' land for a park or playground which it considers desirable or necessary for its future progress, it can readily and lawfully obtain this land in accordance with the Constitution which, we repeat, is the Supreme Law of the land. The Constitution of the United States and the Constitution of Pennsylvania empower the city to take and appropriate private land for public purposes. *All that is required is that just compensation be paid therefor.* We do not propose that our Federal or State Constitution shall be disregarded or nullified either directly or by subterfuge, even though the purposes and objectives of a legislative act are worthy and are sincerely believed to be in the best public interest."

The compulsory dedication of private property to a public use as required by the ordinance in question completely destroys all of the practical value of the constitutional eminent domain provisions. If the City needs land for the use of the public for "park, playground, school, recreational or similar public purposes" it should be acquired by resort to procedures which do not offend constitutional rights of owners of private property. The needed land may be constitutionally acquired through proceedings in eminent domain. The "majority" opinion remains silent

upon this phase of the case although counsel for both sides argue the questions involved at great length.

If I correctly understand the opinion of Mr. Justice Pringle, it bypasses constitutional questions by the method of concluding that the Company "agreed" to abide by the unconstitutional ordinance, and having received certain benefits from the "agreement", it should not be permitted to claim a violation of constitutional rights; and the further conclusion that the City had the right to bargain at arm's length with the Company with regard to annexation and water and sewage. These conclusions are without factual support and are flagrantly out of harmony with well established legal principles hereinafter noted. I think it sufficient to quote the following from the opinion of this court in Town of Sheridan v. Valley Sanitation District, 137 Colo. 315, 324 P.2d 1038, with respect to the argument of the City that it has a right to "bargain" away the provisions of the constitution:

> "A municipality cannot use its police power for bargaining purposes. Sheridan attempted to do just that, namely, acquire a sewer system for its own inhabitants by full use of the facilities being created by the District. 'To permit the city to base its action upon considerations of financial benefit to itself would be allowing it to put its powers up for sale to the highest bidder. * * * We say without hesitation that the city has no right to barter with the police powers, or exact for itself financial benefits as a condition for its exercise. Such power must be exercised for the public good and public welfare, and not for public gain.' State ex rel. Wisconsin Tel. Co. v. City of Sheboygan, 111 Wis. 23, 86 N.W. 657, 662. See also: Wisconsin Tel. Co. v. City of Milwaukee, 223 Wis. 251, 270 N.W. 336."

Thus when the Company presented its petition for annexation to the council of the City that body was charged with

the duty of granting or denying the petition, depending solely upon whether to do one or the other would be in the promotion of the best interests of the City. A municipality cannot impose a burden upon a landowner which deprives him of a right protected by the constitution as a condition upon which it will exercise a discretionary governmental power.

If, in the protection of his business interests, a landowner is forced to respond to an illegal demand in order to avoid serious loss, a court of justice will restore to him as much of the demand as was illegally exacted and involuntarily "agreed to" by him. This leads me to consideration of the doctrine of "business compulsion" which the opinion in this case deftly brushes off with a single sentence to the effect that it is inapplicable. First—I state the rule as it appears in hundreds of opinions of courts of last resort throughout this nation. It is stated in 70 C.J.S. Payment § 147, p. 353, as follows:

> "A recovery may be allowed where the payment of an unlawful demand has been obtained by taking an undue advantage of the situation of the payor, or to prevent an injury to his property rights; and, where a person is compelled through the necessity of protecting his business interests to pay an unlawful demand, the payment may be regarded as compulsory so as to permit its recovery."

The doctrine has been well settled in the law for many years. In 1932 Vol. 79 A.L.R. was published. At page 655 of that volume an exhaustive annotation entitled "Doctrine of Business Compulsion" appears. Countless cases from numerous states are cited upholding the doctrine. I have read approximately forty of these opinions and not one of them can be cited which would support the statement in the majority opinion that, "In the instant case the implications of that doctrine are not applicable."

All of them support my conclusion that the payment involved in this case was made under "Business Compulsion." Numerous cases have been added to the law on this subject since volume 79 A.L.R. was published, which demonstrate the fact that the payment made in this case should be recovered by the defendant under the doctrine of Business Compulsion. Ross Systems v. Linden Dari-Delite Inc., 35 N.J. 329, 173 A.2d 258; Rosen v. Village, 19 Ill. 2d 448, 167 N.E.2d 230; People ex rel. Carpentier v. Arthur Morgan Trucking, 16 Ill. 2d 313, 157 N.E.2d 41; Lewis et al. v. Fahn et al., 113 Cal.App. 2d 95, 247 P.2d 831.

In the State of Colorado the doctrine of "business compulsion" has been recognized and this court has defined the conditions under which the rule shall be available to recover illegal payments made under an "agreement" secured through such compulsion. The opinion in Taylor v. Kelleher, 43 Colo. 424, 97 P. 253, quotes with approval the following:

> "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary • • • there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. • • •"

The doctrine is particularly applicable to payments demanded and received by governmental agencies under an invalid ordinance or statute. In Chicago v. Waukesha Imperial Spring Brewing Co., 97 Ill.App. 583, the court said that there is a manifest distinction between a demand and threat made by a private individual not possessed of any means of enforcing such threat, and payment to governmental authority clothed with power to enforce the

demand by stoppage of the business of the one to whom the threat is made. In that case the court said that the alternative presented to the payer was "to submit to the city's exaction or discontinue its business," and that "money paid under such circumstances, in point of law, is not paid voluntarily any more than that which one hands to a highwayman under threat of personal violence."

The principle that payments made to government to prevent the sacrifice of large capital investments are not voluntarily made, but are made as the result of compulsion, was applied by the Supreme Court of Washington in Olympia Brewing Co. v. State, 102 Wash. 494, 173 P. 430, and the plaintiff was successful in a suit to recover the illegal assessment.

I submit that when the constitution prohibits government from taking private property for public use without compensation, to permit the accomplishment of that result by the device of a so-called "agreement" obtained through business compulsion of the kind clearly established in this case, makes a shambles of constitutionally protected property rights.

In the instant case there is no evidence whatever of an express agreement between the Company and the City. If there is "agreement" it is one implied by the fact that the Company was told that before annexation would be permitted it must comply with the subdivision ordinance and other applicable ordinances, coupled with the fact that the Company paid eight percent of the appraised value of its land in lieu of eight percent of the land itself. The fact that the directors of the corporation held a meeting to weigh the potential for ultimate success of their project after being advised concerning the demand of the City that eight percent of their property must be given up or there would be not water and sewage, and at said meeting determined to go ahead with the enterprise, falls far short of establishing a voluntary agreement between the

Company and the City to surrender the asset. Upon the contrary it establishes, along with much other evidence, the fact of an involuntary surrender to the illegal demand of the City in order to avoid the substantial losses which would inevitably follow a refusal to comply.

Under the foregoing circumstances I am at a complete loss to understand how those who support the majority opinion can justify the statement contained therein that "Robert Morrison himself and the documentary evidence establishes beyond question that: • • •

> "(4) The plaintiff agreed to annex to the City and to make the payment required by the City so that it might receive water and sewer services."

I flatly deny the existence of any such agreement between the Company and the City. There are no "documents" establishing any such an agreement. All the facts point conclusively to an involuntary payment of a sum which the City was forbidden by the constitution to demand. The majority seeks to justify its failure to decide the two important questions involved in this case (namely the constitutionality of the subdivision ordinance and the doctrine of business compulsion) by asserting the controlling facts that, "the company has no constitutional right" to be annexed to the City, or to secure water and sewage connections. This is a false starting point.

In my view the starting point is the constitutional provision that private property cannot be taken for public use without compensation. This is a limitation upon the power of all governmental agencies. It is applicable to all property whether located inside or outside the limits of any city. No agency of government has the power to accomplish such a result. It follows that any demand by governmental agencies for the surrender of private property for public use without compensation is an unconstitutional demand. The majority seems to hold that if

this demand should be made upon a property owner with reference to property already within the city limits, it would be illegal and unconstitutional, but that it attains a different complexion and gains respectability because the demand (prohibited by the constitution) is made upon the owner of property outside the city. Thus, by the majority opinion "fish" is made out of the property rights of the owner of property inside the city limits, and "fowl" is made of the property rights of the owner of property outside the city.

I take the unqualified position that an agency of government cannot force compliance with an unconstitutional demand by making that illegal demand a condition upon which it will act in any matter wherein discretion is vested in government. In making this statement I am confident that it has the support of the highest judicial authority and the approval of outstanding jurists in the nation. I quote very briefly from four of the numerous cases which could be cited, as follows:

From Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 46 S. Ct. 605, 70 L.Ed. 1101:

> "Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.
>
> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valu-

able privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such condition as it sees fit to impose. *But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.*" (Emphasis supplied)

From the concurring opinion of Mr. Justice Frankfurter in Watson v. Employers Liability Corp., 348 U.S. 66, at page 81, 75 S.Ct. 166, at page 175, 99 L.Ed. 74:

"It is true that the corporation's entry (to do business) may not be conditioned upon the surrender of constitutional rights * * *."

From Bynum v. Schiro, D.C., 219 F.Supp. 204:

"The City has no power to make its license to an auditorium user—depend on the licensee's giving up a constitutional right."

From the opinion of Justice Traynor in Danskin v. San Diego Unified School Dist., 28 Cal.2d 536, 171 P.2d 885:

"A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property."

These basic principles are directly involved in this case. They were treated and resolved by the trial court. They were argued at length by counsel. They should not be ignored by this Court through the use of the sentence "The plaintiff agreed to annex to the City and to make the payment required by the City so that it might receive water and sewer services" when there isn't one word in the record to establish any such agreement, either express or

implied, and when there was an abundance of evidence, both direct and circumstantial, to prove the contrary, and when the trial court found that there was no agreement but on the contrary a payment under business compulsion. That which government extorts from the citizen under the pressure of "Business Compulsion" resulting from a demand which the constitution says shall not be made by government, should be returned to the citizen!

I submit that the judgment of the trial court was correct and should be affirmed.

Addendum on Rehearing

In the instant case there was only one issue of fact which the trial court was called upon to determine—all other issues were issues of law. All other material facts were admitted. The "jugular vein" of the plaintiff's case was the issue of fact raised by the following allegations contained in the complaint, which were denied in the answer:

> "• • •; that plaintiff's annexation to defendant city, and compliance with the conditions of Section 2 E (1) of said ordinance No. 1987, as amended were all done involuntarily and against the will and intent of plaintiff, and for the sole purpose of securing defendant's approval of said plat and for the protection of plaintiff's investment in said land, and because of the economic duress and business compulsion being exerted on plaintiff by defendant as more fully hereinafter set forth." (From paragraph X of the complaint.)

It was further alleged in the complaint that by reason of numerous specified acts on the part of the city,

> ", the plaintiff was placed in a servient position and the defendant in a dominant position and by reason of the powers incident thereto and hereinabove set forth, defendant was able to exercise, and did exercise, and still exercises dominion, control, coercion, duress

and undue influence over plaintiff against its will and intent, and involuntarily, was induced, coerced and compelled to, and did pay to defendant said sum of $25,378.08 as demanded by defendant * * *; that, plaintiff did not give nor loan, nor owe said money to defendant, but was coerced and induced into paying the same to defendant solely and exclusively by reason of business compulsion and economic duress exerted over plaintiff by defendant, in order that plaintiff could use and develop said tract of land, and to protect and preserve the business interests and investments of plaintiff therein;" (From paragraph XI of the complaint.)

The foregoing allegations of the complaint were denied by paragraph III of the answer.

The affirmative defenses pleaded by the city serve only to emphasize the point that the single question of fact to be determined in the entire controversy was whether the payment in question was a voluntary payment or whether it was a payment made under compulsion and duress. No one with the slightest conception of applicable legal principles would contend that a recovery by the plaintiff could be had in this case upon any theory whatever except upon *the determination as a matter of fact* that the payment was involuntarily made.

The parties to the action, their attorneys, and the trial court thoroughly understood this situation. They fully realized that if the payment by the plaintiff was involuntarily made under business compulsion it could be recovered. They all recognized that if the payment was voluntarily made and was free from duress the plaintiff could not recover! This was the issue of fact upon the determination of which the plaintiff would succeed or fail. This issue was decided by the trial court in favor of the plaintiff!

Upon this single, all important issue the trial court said in its findings, "The Court finds that *plaintiff has not by agreement or waiver* lost its right to attack the validity or constitutionality of this ordinance * *"

Notwithstanding this clear and unambiguous statement that no agreement prevented the plaintiff from asserting his constitutional rights, the majority opinion, in some mysterious and wholly unexplained manner, reaches the amazing conclusion that "the plaintiff *agreed* to make the payment".

In entering the judgment for the plaintiff upon the issues framed by the pleadings the court necessarily and specifically found exactly the opposite.

When a litigant succeeds in establishing by competent evidence the one controlling fact upon which his entire case depends, to the satisfaction of the trial court, it is indeed a tragic thing and a travesty upon justice when an appellate court takes away from him all of the facts which have been adjudicated in his favor, and enters opposite findings of its own for which there isn't the slightest justification in the record of the case.

Thus the majority opinion in this case has deprived the plaintiff of due process of law as guaranteed by the constitution of the United States and of Colorado, and has permitted the City of Colorado Springs to seize 8% of its property for public purposes without compensation.

If the majority opinion is sound, due process of law in Colorado is dead, and the constitution is an empty shell which affords protection to no one against demands by agencies of government which fundamental law commands shall never be made.

APPENDIX B

Section 2E(1) of ordinance No. 1987 of the City of Colorado Springs, Colorado, as amended by ordinance No. 2179 (§ 35-29, 1958 Code), is as follows:

Allocation of Land for Public Spaces. The owner of the land in each subdivision shall allocate and convey eight per cent of the area of the land in his subdivision, exclusive of streets and alleys, for park, playgrounds, schools, recreational or similar public purposes, at such location as designated by the City or at the option of the City, said owner, shall in lieu of such conveyance of land in kind, pay to the City in cash an amount equal to eight per cent of the value of the land. If the City and the owner fail to agree on the value of said land, such value shall be fixed and established by the Real Estate Appraisal Committee of the Colorado Springs Board of Realtors. The proceeds of said payments shall be deposited in a separate City account and shall be used only for the acquisition of land for parks, playgrounds, schools, recreational or similar public purposes. The provisions of this ordnance shall be applicable to each area, territory, subdivision or addition which is being, or is hereafter annexed to the City of Colorado Springs to the end that there shall be allocated or paid to the City of Colorado Springs the eight per cent in land or value thereof in dollars as herein provided. To the extent that public uses or areas have been provided in said area or territory annexed to the City, such uses or areas may receive credit at the option of the City to the extent applicable upon the eight per cent allocation of land or equivalent value in dollars.[1]

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[1] Section 2E appears here as set forth in the opinion of the Colorado Supreme Court and as it was originally promulgated. In the edited version which is printed in "The Code of the City of Colorado Springs Colorado," § 35-29, p. 772 (Michie City Publications, Los Angeles, 1958), there are minor changes in language and style which are not relevant here.

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution provide:

> • • • [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 20615

THE CITY OF COLORADO SPRINGS, a municipal corporation,
Plaintiff in Error

vs.

KITTY HAWK DEVELOPMENT CO., a corporation,
Defendant in Error

Error to the District Court of El Paso County

This cause having been brought to this court by writ of error to review the judgment of the District Court of El Paso County and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annulled and altogether held for naught; and that this cause be remanded to said District Court with instructions to dismiss the complaint.

It is further ordered and adjudged that said plaintiff in error do have and recover of and from said defendant in error its costs in this court expended, to be taxed.

By the Court. May 4, 1964.

Office-Supreme Court, U.S.
FILED
NOV 4 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 565

KITTY HAWK DEVELOPMENT CO., a Corporation,
Appellant,

v.

THE CITY OF COLORADO SPRINGS, COLORADO,
a municipal corporation, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS

F. T. HENRY,
City Attorney,

LOUIS JOHNSON,
Assistant City Attorney,
City of Colorado Springs
501 Mining Exchange
Building,
Colorado Springs,
Colorado.

CHARLES S. RHYNE,
BRICE W. RHYNE,
ALFRED J. TIGHE, JR.,
Rhyne & Rhyne,
400 Hill Building,
Washington 6, D. C.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 565

KITTY HAWK DEVELOPMENT CO., a Corporation,
Appellant,

v.

THE CITY OF COLORADO SPRINGS, COLORADO,
a municipal corporation, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS

Appellee, City of Colorado Springs, moves to dismiss the appeal herein pursuant to Rule 16 of the Revised Rules of this Court, upon the grounds that (1) no substantial federal question is presented by this appeal, (2) the judgment of the Supreme Court of Colorado rests on an adequate non-federal basis, and (3) the federal question sought to be reviewed was not passed on by the Supreme Court of Colorado.

Question Presented

Was a subdivider of land located outside a city's boundaries deprived of constitutional rights when he paid

the city $25,378.08 six years ago for furnishing city water, sewer and other services to comply with legislative requirements for annexation and subdivision approval?

Statement of the Case

This is an appeal from a Judgment of the Supreme Court of Colorado which held that the Appellant, a land subdivider, was not entitled to the return of fees paid by way of agreement some six years previously, for the furnishing of city utilities and services to a subdivision upon annexation to the city. 392 P. 2d 467 (Colo. 1964), Jurisdictional Statement 4A.[1]

The Kitty Hawk Development Co., Appellant, was incorporated in 1954 for the sole and exclusive purpose of acquiring a 100 acre tract of land in El Paso County, Colorado (R. 94). The tract was situated outside the corporate limits of the City of Colorado Springs, a charter city under Article XX, Section 6 of the Colorado Constitution. It was Appellant's original intention that the subdivision remain outside the City limits. (R. 98)

The president and major stockholder of the Appellant corporation was a seasoned businessman with many years of practical experience in the field of real estate and land subdivision. (R. 114). Purchase of the land for subdivision purposes was made at a cost of $442,215.00 after consideration of factors such as the costs for street improvements, the availability of water, sewer and other utilities and the potential market area. (R. 115, 116).

Appellant acquired the property under a contract contingent upon arrangements being completed with the City of Colorado Springs to furnish utilities. (R. 37).

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[1] The Jurisdictional Statement is referred to herein as "J.S."; and the Transcript of Record in the Supreme Court of Colorado as "R."

Under the agreement the seller was to apply to the City[2] and County officials for plat approval of the subdivision and the development company was to pay all the expenses. The contract as amended indicated that the purchaser was to use due diligence to have the property legally and properly zoned, the plat approved and arrangements completed for the installation of utilities with the City of Colorado Springs but in the event that the purchaser was unable to obtain the platting, zoning and arrangements for utilities, the contract was to become null and void and payment made thereunder returned to purchaser. (R. 37, 38, 39)

After approval of the Kitty Hawk Subdivision by the Planning Commission and the Board of County Commissioners of El Paso County (R. 97, 98), Appellant was advised that city water and sewer services were not available for the subdivision outside the City limits. The City was not a public utility for the furnishing of water and sewer services and had no obligation to provide such services outside the City. However, Appellant was advised that the tract could be annexed to the City, and that upon annexation, the subdivision would be entitled to all City facilities and services. (R. 121, 124, 125, 148, 149)

City ordinances with which the subdivision would have to comply included the electrical, plumbing, building and zoning codes (R. 149, 150) and the subdivision ordinance.

City of Colorado Springs Ordinance No. 1987, known as the Subdivision Ordinance, provides for the platting

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[2] Colo. Rev. Stats., 1953, §§ 139-59-12, 139-59-13, authorizes a municipal planning commission to control a major street plan for land lying within three miles of the corporate limits. Colorado Springs Ordinance 1987, known as the Subdivision Ordinance, implements this enabling legislation. The requirement as to the major street plan constituted the only essential contact of the City with Appellant outside the City limits (R. 102, 103, 104, 153, 163).

and layout of subdivisions, street systems, installation and control of public utilities, safety facilities, the acquisition of desirable public space and the proper distribution of population, all to promote the health, welfare and safety of the people. Its jurisdiction is limited to the area within the corporate limits of the City except as to major street plans. (R. 8, 9)

Section 2-E of the subdivision ordinance provides that the owner of land in a subdivision shall allocate eight per cent of the subdivision exclusive of streets and alleys for parks, playgrounds, schools, recreational or similar public purposes at such location as designated by the City or at the option of the City to pay to it an amount equal to eight per cent of the appraised value of the land. (J.S. 39a). This formula as to the appraised value was the method used to compute the amount paid to the City for water and sewer services.

The status of Appellant and Appellee at this point was succinctly stated by the Supreme Court of Colorado:

"(1) The Plaintiff was in need of water and sewer services from the city, but preferred not to annex to the city;

"(2) Plaintiff could obtain city water and sewer services only in the event of annexation of the Kitty Hawk Subdivision to the city;

"(3) The city conditioned annexation upon payment by the Plaintiff to the city of an amount equal to eight per cent of the appraised valuation of the subdivision;

"(4) The Plaintiff agreed to annex to the city and to make the payment required by the City so that it might receive water and sewer services;

"(5) Water and sewer services were supplied Plaintiff upon annexation and the payment of $25,378.08." (J.S. 10a, 11a).

The Board of Directors of the Kitty Hawk Development Company cognizant of and fully understanding the conditions upon which annexation could be accomplished and the resulting municipal service and advantages made available caused the then owner of the tract to initiate the petition for annexation. (R. 101, 108, 132-135, 149-152, 204, 277-283).

After notice and other preliminary proceedings for annexation, Ordinance No. 2204 was adopted by Colorado Springs on March 8, 1955. This ordinance of annexation, together with the annexation plat, was subject to the conditions, agreed to by Appellant, that the subdivision comply with all of the ordinances of the City including those relating to the subdivision of land. Accordingly, when the annexation was consummated by Ordinance No. 2204, it was with the understanding that Kitty Hawk Subdivision would comply with all city ordinances and would receive all municipal benefits including city water, sewer, other utility and municipal services.

The plat of the Kitty Hawk Subdivision was approved by the City on March 22, 1955. This plat, as did the annexation plat and the annexation ordinance, contained statements that the subdivision was subject to all ordinances of the city relating thereto and the two plats made direct reference to th[redacted]ivision ordinance.

After the approv[redacted]e subdivision plat, land of the Kitty Hawk Subdivision was appraised at $317,226.50, an amount almost $125,000.00 less than Appellant's purchase price. Appellant then on August 12, 1955, paid to the City the sum of $25,378.08 or eight per cent of the appraised value of the land.

The payment of this fee had been agreed to by Appellant to receive the city water and sewer services. The amount was determined by the formula prescribed in the

Subdivision Ordinance and is consistent with the estimated amount which the Board of Directors of Appellant agreed to pay in order to secure annexation and acquire the needed water and sewer services.

As stipulated by the parties, annexation and subdivision requirements being fully complied with, water and sewer lines and other utilities were installed; streets built and other municipal services, including fire and police services, furnished. Houses have now been built and sold on a substantial portion of the lots in the subdivision.

Appellant after accepting all the benefits of annexation which they freely sought, contracted for and acquiesced in for approximately six years, then brought this action for return of the fee paid with interest.

The Supreme Court of Colorado dismissed the complaint saying it was not necessary to determine the constitutionality of the subdivision ordinance as Appellant was precluded by other matters appearing in the record from recovering. In a comprehensive opinion the Court found:

(1) that the City was under no obligation to sell or furnish water or sewer services outside its corporate limits;

(2) if it elected to do so it acted in a proprietary capacity with a resulting contractual relationship;

(3) no governmental power was bargained for, nor was any constitutional right surrendered;

(4) the law of the State and the State constitution do not prohibit the imposition of conditions by a municipality upon one seeking annexation.

The Court stated: "We see no reason, legal or moral, why the Plaintiff should have all of the benefits of its bargain by which it obtained the water and sewer services it needed in order to carry out its plans, and yet receive

back from the City a portion of the consideration which it gave in order to obtain these services, which the City was under no constitutional or statutory obligation to furnish." (J.S. 12a, 13a).

ARGUMENT

I. No Substantial Federal Question Is Presented

A. *The Fourteenth Amendment Is Not Violated By Provisions Of The Constitution or Law Of Colorado Relative To Powers Of Political Subdivisions.*

In the absence of constitutional restrictions (*Williams* v. *Eggleston*, 170 U.S. 304, 310, *Mount Pleasant* v. *Beckwith*, 100 U.S. 514, 524) the legislature has absolute control over the number, nature, duration and extent of powers conferred upon political subdivisions and the territory over which they shall be exercised. The state is supreme as to the powers of its political subdivisions and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 179. A long line of decisions of this court reaffirms this principle. cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343.

1. *There is No Constitutional Right To Annexation To City.*

Municipal corporations are political subdivisions of the state created for exercising such powers as may be delegated to them. Territory to be included within a city is a discretionary function of the governing body. *Kelly* v. *Pittsburgh*, 104 U.S. 78, 81.

Colorado law permits a contiguous area to be annexed

upon application to the municipality by the owners of more than 50 per cent of the area, together with the consent of more than 50 per cent of the landowners residing in the area. (Colo. Rev. Stats. 1953, § 139-11-3). Annexation is thus initiated by the people who seek annexation. However, as stated by the Supreme Court of Colorado "A municipality is under no legal obligation in the first instance to annex contiguous territory, and may reject a petition for annexation for no reason at all." (J.S. 13a.)

This construction of state law is binding upon this Court. *Jefferson Branch Bank* v. *Skelly*, 1 Black (U.S.) 436, 443; *Morehead* v. *New York*, 298 U.S. 587, 609; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78; *Great Northern Ry. Co.* v. *Sunburst O. & R. Co.*, 287 U.S. 358, 362.

2. *There Is No Constitutional Right To Receive City Water.*

A municipality is not bound to furnish water or sewer services to everyone who demands it. As a general rule a municipality which engages in furnishing water to its inhabitants has a governmental discretion as to the limits to which it is advisable to extend its mains, and unless such discretion is abused, its decision in the matter is determinative. *Brasier* v. *Lincoln*, 159 Neb. 12, 65 N.W. 2d 213 (1954), cert. den. 348 U.S. 926.

Likewise a city cannot be compelled to supply water to nonresidents outside its corporate limits in the absence of contract or of a course of action from which it could be found that the municipality had held itself out as a public utility in an entire area. See the array of authorities collected at 48 A.L.R. 2d 1222, 1230.

Under Colorado law (Colo. Rev. Stats. 1953, §139-32-1 (39), cities have power to supply water from their water systems to consumers outside the corporate limits. How-

ever, the city is under no obligation to sell or furnish water or sewer services to anyone outside its corporate limits, and if the city elects to do so, it acts in a proprietary capacity, and the relationship entered into between a city as a supplier and users is purely contractural. *City of Englewood* v. *City and County Denver*, 123 Colo. 290, 229 P. 2d 667 (1951); *City of Colorado Springs* v. *P.U.C.*, 126 Colo. 265, 248 P. 2d 311 (1952); *Lee* v. *City of Colorado Springs*, 136 Colo. 248, 315 P. 2d 822 (1957), cert. den. 355 U.S. 955; *City of Fort Collins* v. *Park View Pipe Line*, 139 Colo. 119, 336 P. 2d 716 (1959).

This construction of the Colorado law on municipal powers is binding upon this Court. *Jefferson Branch Bank* v. *Skelly*, 1 Black (U.S.) 436, 443; *Morehead* v. *New York*, 298 U.S. 587, 609; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78; *Great Northern Ry. Co.* v. *Sunburst O. & R. Co.*, 287 U.S. 358, 362.

Accordingly, Appellant has no constitutional right to annexation to the City of Colorado Springs, nor to receive extraterritorily the water and sewer services of the City of Colorado Springs. As stated by the Supreme Court of Colorado "No governmental power was bargained for here, nor was any constitutional right surrendered, for plaintiff had no constitutional or statutory right to receive water and sewer services from the defendant." (J.S. 11a, 12a).

II. Judgment Rests Upon Adequate Non-Federal Basis

Appellant as an owner of land located outside the city had no constitutional or statutory right to receive water and sewer services from the City. The City likewise had no obligation to annex the land nor to furnish it with water and sewer services.

As a charter city under Article XX of the Colorado Constitution, Appellee possessed full home rule powers. Acting in a proprietary capacity if electing to furnish water and sewer services outside its corporate limits, under Colorado law, the City as supplier and the user enter into a contractual relationship. *City of Englewood* v. *City and County of Denver*, 123 Colo. 290, 229 P. 2d 667 (1951); *City of Colorado Springs* v. *P.U.C.*, 126 Colo. 265, 248 P. 2d 311 (1952); *Lee* v. *City of Colorado Springs*, 136 Colo. 248, 315 P. 2d 822 (1957), cert. den. 355 U.S. 955; *City of Fort Collins* v. *Park View Pipe Line*, 139 Colo. 119, 336 P. 2d 716 (1959).

The Supreme Court of Colorado finding no compulsion on either Appellant or Appellee as to annexation or the furnishing of city services, found that the Appellant wanted water and sewer services and the Appellee required Appellant to agree to annex its property to the city to comply with the city's subdivision and all other ordinances. The Court concluded "We see no reason, legal or moral, why the Plaintiff should have all the benefits of its bargain by which it obtained the water and sewer services it needed in order to carry out its plans, and yet receive back from the City a portion of the consideration which it gave in order to obtain these services, which the city was under no constitutional or statutory obligation to furnish." (J.S. 12a, 13a).

With the contract relationship present, the Court found it unnecessary to determine any constitutional question. In so ruling, it followed precedent from Colorado. *State ex rel. Cruse* v. *American Can Co.*, 117 Colo. 312, 186 P. 2d 779 (1947). The Court also followed the policy stated by this Court in *District of Columbia* v. *Little*, 339 U.S. 1, 3: "This is therefore an appropriate case in which to apply our sound general policy against deciding consti-

tutional questions if the record permits final disposition of a cause on non-constitutional grounds."

Disposing of Appellants "business compulsion" theory and finding an adequate non-federal basis for its judgment, the Court stated "the only 'compulsion'—legal or otherwise—serving to motivate Morrison and his associates was the desire to make a profit on the Kitty Hawk Subdivision". (J.S. 12a).

Union Pacific R. Co. v. *Public Service Commission*,[3] *Staub* v. *City of Baxley*,[4] *Armstrong* v. *United States*,[5] *Frost & Frost Trucking Co.* v. *Railroad Comm'n. of California*,[6] and other cases[7] and authorities cited by Appellant relative to "unconstitutional conditions" clearly are not applicable to this case.

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[3] 248 U.S. 67, concerned the validity of a charge by the Public Service Commission of Missouri for a certificate authorizing the issuance of bonds secured by a mortgage on the lines of the foreign corporation and involved interstate commerce.

[4] 355 U.S. 313, invalidated an ordinance which required a permit to be issued within the discretion of the city before soliciting membership for any organization, and involved an infringement upon the freedom of speech.

[5] 364 U.S. 40, concerned materialmen's liens under state law furnished a contractor building boats for the United States and involved the transfer of title upon default, and the sovereign immunity of the United States against materialman's liens.

[6] 271 U.S. 583, concerned the power to compel by legislation a private carrier to assume the duties and burdens of a common carrier for the privilege of using California highways and affirmed the interpretation of a state statute by the state court.

[7] *Pioneer Trust and Savings Bank* v. *Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E. 2d 799 (1961); *Rosen* v. *Village of Downers Grove*, 19 Ill. 2d 448, 167 N.E. 2d 230 (1960); *Miller* v. *Beaver Falls*, 368 Pa. 189, 82 A. 2d 34 (1951); and *Kelber* v. *City of Upland*, 155 Cal. App. 2d, 631, 318 P. 2d 561 (Dist. Ct. App. 1957) also cited by Appellant involving enabling powers are similarly not applicable in this contract situation. Cases dealing with subdivision regulations are collected in the Annotation at 11 A.L.R. 2d 525. In this case enabling power is present (Article XX, Constitution of Colorado, see *City of Denver* v. *Board of Commissioners of Arapahoe County*, 113 Colo. 150, 156 P. 2d 101 (1945) and the funds were paid into a Special Account known as Parks and School Property.

In the language of Appellant ". . . if a constitutional right is involved, the surrender of it cannot be made a condition to governmental action." (J.S. 13, 14). But here no constitutional right was surrendered. The Supreme Court of Colorado expressly found "nor was any constitutional right surrendered". (J.S. 11a). From Appellant's attempt to explain away *Stephenson* v. *Binford*, 287 U.S. 251, it can be seen that if the surrender of a constitutional right is not involved, the doctrine does not apply.

Moreover, the assailed provisions are not ends in and of themselves but means to the legitimate end of promoting the health, welfare and safety of the public by regulating the boundaries of the City and the availability of its services. This Court has long upheld regulations governing growing metropolitan areas as a valid exercise of the police power. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365; *Welch* v. *Swasey*, 214 U.S. 91; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590.

III. Federal Question Was Not Passed on by Colorado Supreme Court

In the words of the Colorado Supreme Court ". . . it is not necessary under the circumstances of this case to determine the constitutionality of Section 2E(1) of the City's Subdivision Ordinance, since the plaintiff is precluded by other matters appearing in the record from recovering that which is sought." (J.S. 10a).

This court has consistently followed the rule laid down in *Bolling* v. *Lersner*, 91 U.S. 594, 595, "We cannot reexamine the judgment or decree of a State court simply because a Federal question was presented to that court for determination. To give us jurisdiction, it must appear that such a question was in fact decided, or that its decision was necessarily involved in the judgment or decree as

rendered." See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 298; *Wilson* v. *Cook*, 327 U.S. 474, 480; *Herb* v. *Pitcairn*, 324 U.S. 117, 126.

Conclusion

For the reasons given above, the appeal should be dismissed as (1) no substantial federal question is presented, (2) the judgment of the Supreme Court of Colorado rests on an adequate non-federal basis, and (3) the federal question sought to be reviewed was not passed upon by the Supreme Court of Colorado.

Respectfully submitted,

F. T. Henry,
City Attorney,

Louis Johnson,
Assistant City Attorney,
City of Colorado Springs
501 Mining Exchange
Building,
Colorado Springs,
Colorado.

Charles S. Rhyne,
Brice W. Rhyne,
Alfred J. Tighe, Jr.,
Rhyne & Rhyne,
400 Hill Building,
Washington 6, D. C.

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IN THE

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OCTOBER TERM, 1964

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KITTY HAWK DEVELOPMENT CO., a corporation,
Appellant

v.

THE CITY OF COLORADO SPRINGS, a municipal corporation, *Appellee*

On Appeal from the Supreme Court of Colorado

BRIEF IN OPPOSITION TO MOTION TO DISMISS

ROBERT DUNLAP
Cool & Phillips
Mining Exchange Building
Colorado Springs, Colorado

E. BARRETT PRETTYMAN, JR.
Hogan & Hartson
800 Colorado Building
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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Appellant

v.

THE CITY OF COLORADO SPRINGS, a municipal corporation, *Appellee*

On Appeal from the Supreme Court of Colorado

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee, the City of Colorado Springs, has filed a motion to dismiss Kitty Hawk's appeal on the grounds that no substantial Federal question is presented, the judgment below rests on an adequate non-Federal basis, and the Federal question was not passed on by the Colorado Supreme Court. In each instance, the City

premises its argument on erroneous assumptions and fails to meet the record and the issues actually before the Court.

In its outline of the facts, the City states (p. 5) that the payment of $25,378.08 was made by Kitty Hawk "to receive the city water and sewer service". The same assumption is made in the Question Presented (pp. 1-2). If the City means that the money was paid because Kitty Hawk had no choice but to pay in order to obtain the necessary water and sewer services, we agree. But if the City means that the money was paid to *compensate* the City for water and sewer services, this simply is not true and is not even a matter for speculation. The Assistant City Attorney himself prepared the receipt given to Kitty Hawk at the time of payment, and it clearly shows that the money was paid in lieu of 8% of the land as required by the City's subdivision ordinance.[1] The only relationship between the payment and the services was that the City refused to render the services until and unless Kitty Hawk turned over 8% of the value

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[1] The receipt reads:

> Receipt is hereby acknowledged from Kitty Hawk Development Co. of the sum of Twenty-five Thousand Three Hundred Seventy-Eight and 08/100 Dollars ($25,378.08) in full payment of eight per cent (8%) of the appraised value of the land in Kitty Hawk Subdivision in lieu and in place of the allocation of eight per cent (8%) of the area of land in said subdivision and all in accordance with resolutions of the City Council of Colorado Springs relating to allocation of land in each subdivision or payment in cash in lieu thereof.
>
> THE CITY OF COLORADO SPRINGS
> By /s/ LOUIS JOHNSON
>
> [Plaintiff's Exhibit H (fols. 409, 196).]

of its land. This is, of course, the very condition which Kitty Hawk claims is unconstitutional.

In a similar vein, the City refers (p. 8) to a stipulation that subsequent to annexation, "water and sewer lines and other utilities were installed; streets built and other municipal services * * * furnished." Here again, the inference is that Kitty Hawk got value received for its money; that its payment was to compensate the City for improvements to the land. But the City neglects to set forth the remainder of the stipulation, which clearly shows that Kitty Hawk received no benefits other than those accorded all property owners in the City, and that Kitty Hawk paid the same City taxes that other property owners paid.[2] Kitty Hawk made its payment not to compensate the City for improvements but because the subdivision ordinance required an 8% donation of property. The evidence is uncontradicted that capital improvements were furnished at the sole expense of Kitty Hawk—at a cost of almost $200,000.00. Fol. 282.

The City cites *Hunter* v. *Pittsburg*, 207 U.S. 161, 179 (1907), in support of its first argument (p. 7)

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[2] The remainder of the stipulation reads: "* * * The property in Kitty Hawk Subdivision and the owners thereof have received no services or benefits not also accorded to other property annexed to the City and other property owners in the City of Colorado Springs; the property owners in Kitty Hawk Subdivision have paid property and other City taxes in the same manner as other property owners in the City of Colorado Springs and other subdividers and property owners similarly situated to the plaintiff herein have paid the 8% subdivision fee and other fees and charges required to be paid by the plaintiff. There has been nothing in the services performed for, or the benefits conferred upon, the property and property owners in Kitty Hawk Subdivision of a special nature or out of the ordinary, nor has there been anything unusual about the tax burden borne by the property and property owners in Kitty Hawk Subdivision since its annexation." Fols. 107-109.

that a state legislature, "conforming its action to the state constitution, may do as it will [in regard to the powers of political subdivisions], unrestrained by any provision of the Constitution of the United States." This same argument, also supported by the *Hunter* case, was made to this Court in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960)—and was rejected. After discussing *Hunter* and other cases, the Court pointed out in *Gomillion* that it has "never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.* at 344-345. The Court specifically cited the *Frost* case[3] with approval (*id.* at 345), and it concluded:

> This principle [that a State cannot use its power to circumvent a federally protected right] has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition." What the Court has said in those cases is equally applicable here, *viz.*, that "Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States* v. *Reading Co.*, 226 U.S. 324, 357, *and a constitutional power cannot be used by way of condition to attain an unconstitutional result.*" *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105, 114. [364 U.S. at 347-348; emphasis added.[4]]

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[3] *Frost & Frost Trucking Co.* v. *Railroad Comm'n of California*, 271 U.S. 583 (1926). See our Jurisdictional Statement, pp. 12-15.

[4] This same principle was subsequently approved in *Baker* v. *Carr*, 369 U.S. 186, 229-231 (1962), and *Gray* v. *Sanders*, 372 U.S. 368, 381 (1963).

There could hardly be a clearer statement of the doctrine involved in this case or a clearer indication that it is as applicable today as it was when first enunciated.

The City contends (pp. 7-8) that Kitty Hawk had no constitutional right to annexation. We need not pause over this argument, because Kitty Hawk has not claimed a constitutional right to annexation. The same must be said of the contention (pp. 8-9) that Kitty Hawk had no constitutional right to receive City water. The City does not seem to understand that a municipal benefit, even when it may be withheld altogether, cannot be granted on condition that a constitutional right be surrendered. This rule, totally ignored by the City in its Motion,[5] has been reiterated time and again, though not always in precisely the same form or context. For example:

> [A] constitutional power cannot be used by way of conditions to attain an unconstitutional result. [*Western Union Tel. Co.* v. *Foster*, 247 U.S. 105, 114 (1918), and *Gomillion* v. *Lightfoot*, *supra*, 369 U.S. at 347-348.]
>
> The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. [*Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1, 47-48 (1910) (and see the cases cited at pages 35-36).]
>
> [A] State may not, in imposing conditions upon the privilege of a foreign corporation's doing busi-

[5] The closest the City comes to recognizing that it has no absolute right of condition is when it states on page 8 that a municipality's discretion as to how far it will extend its water mains is determinative "unless such discretion is abused." It has been abused three times over in this case. Jurisdictional Statement, p. 12.

> ness in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts * * *. [*Terral* v. *Burke Constr. Co.*, 257 U.S. 529, 532 (1922).]
>
> [T]he State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. [*Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426, 434 (1926) (and cases there cited).]
>
> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. [*Frost & Frost Trucking Co.* v. *Railroad Comm'n*, *supra*, 271 U.S. at 593-594.]
>
> [T]he corporation's entry may not be conditioned upon surrender of constitutional rights * * *. [*Washington ex rel. Bond & Goodwin & Tucker, Inc.* v. *Superior Court*, 289 U.S. 361, 365 (1933).] The City has no power to make its license to an auditorium-user depend on the licensee's giving up a constitutional right. [*Bynum* v. *Schiro*, 219 F. Supp. 204, 210 (E.D. La. 1963), *aff'd per curiam*, 374 U.S. 395 (1964).]

Never once does the City come to grips with the principle established by these cases. It concedes (pp. 3-4, 10) that the City conditioned annexation and water on the giving up of property and that no compensation

was paid for the property. Yet it contents itself with arguing that Kitty Hawk had no constitutional right to annexation or water. It thus flails at strawmen.

The City next argues (pp. 9-12) that the judgment rests on an adequate non-federal basis. The City does not dispute that Kitty Hawk raised its Federal constitutional questions at all appropriate stages in the courts below. The City argues instead that these questions were not passed upon by the Colorado Supreme Court, and that Kitty Hawk "agreed," or contracted, to give up its land in order to obtain certain services (which the City does not deny were essential to the survival and use of the remaining property).

Precisely the same kind of "contractual" argument was made to this Court—and rejected—in *Hanover Fire Ins. Co.* v. *Harding*, 272 U.S. 494 (1926), where the state court had ruled[6] that because the General Assembly had the power to prescribe the conditions upon which foreign corporations could do business in the state, the Assembly could make past compliance with an unconstitutional tax a condition to the renewal of a license to do business. When the taxpayer appealed, the very first three arguments made by the County Treasurer in his brief to this Court were that: "The State of Illinois had the right to prescribe the terms and conditions upon which plaintiff in error might transact business within the borders of the State";[7] "Plaintiff in error came into the State of Illinois for the transaction of business with full notice of the payments of money which it would be required

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[6] *Hanover Fire Ins. Co.* v. *Carr*, 317 Ill. 366, 148 N.E. 23 (1925), *rev'd sub nom. Hanover Fire Ins. Co.* v. *Harding*, 272 U.S. 494 (1926).

[7] Brief for Defendant in Error, *Hanover Fire Insurance Company* v. *Carr*, October Term 1925, No. 179, p. 10.

to make";[8] and "The obligation of plaintiff in error is a contract obligation, the presumption being that when it accepted and exercised the privilege it assented to the obligation to pay the tax in question."[9]

But this Court overruled the state court, rejected these contentions and held:

> One argument urged against our conclusion is that the relation of a foreign insurance company to the State which permits it to do business within its limits, is contractual, and that, by coming into the State and engaging in business on the conditions imposed, it waives all constitutional restrictions, and can not object to a condition or law regulating its obligations, even though, as a statute operating *in invitum*, it may be in conflict with constitutional limitations. This argument can not prevail in view of the decisions of this Court in well considered cases. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Western Union Telegraph Company* v. *Kansas*, 216 U.S. 1; *Terral* v. *Burke Construction Co.*, 257 U.S. 529; *Fidelity & Deposit Company* v. *Tafoya*, 270 U.S. 426; *Frost* v. *Railroad Commission*, 271 U.S. 583. [272 U.S. at 571[10].]

And so here, Kitty Hawk was given the alternative of surrendering its property without compensation or foregoing the essential services that only the City could render. Having been thus compelled to give up its property, Kitty Hawk cannot now be held to have "contracted" away its right to complain of the depri-

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[8] *Id.* at p. 16.

[9] *Id.* at p. 20.

[10] Cited with approval, *e.g.*, in *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 571 (1949), and *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150, 166-167 (1940).

vation. We flatly deny the existence of any such "contract."

This Court, of course, determines for itself whether there is an adequate, independent non-Federal ground on which the judgment rests,[11] and in so doing reaches its own conclusion as to the practical effect and operation of challenged regulations.[12] The failure of a state court to pass upon a constitutional issue, or its failure to *say* that it passed upon the issue,[13] is not conclusive.[14] In this case, there is no non-Federal ground, adequate or otherwise. Every one agrees that the City conditioned the grant of the essential benefits of water, annexation and subdivision upon Kitty Hawk's giving up its property without compensation. Therefore, the Colorado Court should never have reached any question of "contract," because the City had no right even to put Kitty Hawk to the choice. (See our Jurisdictional Statement, p. 18). But even if a question of "contract" were involved, it is one of mixed law and

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[11] *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958); *Enterprise Irrigation Dist.* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

[12] *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389, 392 (1952); *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 29 (1951).

[13] It is not at all certain that the Federal question *was* ignored by the Colorado Supreme Court. The essence of that Court's decision, in our view, is in the following language: "We find nothing in the general law of this state or in the Constitution prohibiting the imposition of conditions by a municipality upon one seeking annexation." Appendix to Jurisdictional Statement, p. 13a.

[14] *Wood* v. *Chesborough*, 228 U.S. 672, 676-680 (1913); *West Chicago St. R. R.* v. *Illinois ex rel. Chicago*, 201 U.S. 506, 519-520 (1906); *Chicago, B. & Q. Rw.* v. *Illinois ex rel. Drainage Comm'rs*, 200 U.S. 561, 580-581 (1906).

fact inextricably bound up in the constitutional issue itself. Thus, a resolution of the constitutional issue "was necessarily involved in the judgment or decree as rendered." *Bolling* v. *Lersner*, 91 U.S. 594, 595 (1876).

We respectfully submit that the Motion to Dismiss should be denied and probable jurisdiction noted so that this important case may be heard on the merits.

Respectively submitted,

ROBERT DUNLAP
Cool & Phillips
Mining Exchange Building
Colorado Springs, Colorado

E. BARRETT PRETTYMAN, JR.
Hogan & Hartson
800 Colorado Building
Washington 5, D. C.

Attorneys for the Appellant
Kitty Hawk Development Company